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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SAMUEL MOORE AND COMPANY and
EATON CORPORATION,

Petitioners,

v.

MULTIFLEX, INC.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Can a dangerous probability of monopolization be inferred in an attempt to monopolize case under Section 2 of the Sherman Act where the defendant's market share was more than halved during the period of the alleged attempt and there were no barriers to entry to the market?

PARTIES INVOLVED

The parties to the proceeding in the court below are those named in the caption of the case in this court. *

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* Samuel Moore and Company is a subsidiary of Eaton Corporation. Other subsidiaries of Eaton Corporation, other than wholly-owned subsidiaries, are the following:

Alligator Ventilfabrik, G.m.b.H.
Asiaphil Cutler-Hammer, Inc.
Axles India Limited
C.H.I. Properties (Private) Limited
Cutler-Hammer (Private) Limited
Culter-Hammer Centroamericana, S.A.
Cutler-Hammer Europa Limited
Eaton Manufacturera, S.A. de C.V.
Eaton, S.A.
Ejeuen, S.A.
Japan Fawick Company, Limited
Nitta-Moore Company, Ltd.
Productos Eaton Civia, S.A.
Puromex, S.A. de C.V.
Sumiju Eaton Soko Systems Company, Limited
Sumitomo Eaton Hydraulics Co., Ltd.
Tamco Cutler-Hammer Pte. Ltd.
Tamco Cutler-Hammer Sdn. Berhard
The Electron Corporation

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION	2
STATEMENT	2
1. Factual Background	3
2. The Decision Below	6
REASONS FOR GRANTING THE WRIT	8
1. The Decision Below Compounds Confusion in the Lower Courts as to the Scope of the Attempt to Monopolize Offense and What Proof of a Dangerous Probability of Success Requires	9
2. This Court Should Make Clear That a Finding of a Dangerous Probability of Monopoly Cannot Properly be Made Without Evaluating the Presence or Absence of Significant Barriers to Entry in the Relevant Market	14
3. This Court Should Forestall the Growing Use of Section 2 of the Sherman Act as a General Code of Unilateral Business Conduct	17
CONCLUSION	20
APPENDICES:	
App. A: Fifth Circuit Opinion, July 22, 1983	
App. B: Circuit Court Notice Denying Petition for Rehearing and Suggestion for Rehearing En Banc, September 14, 1983	
App. C: District Court Final Judgment, September 4, 1981	

TABLE OF AUTHORITIES

	Page
CASES:	
ALW v. United States Airlines, 510 F.2d 52 (9th Cir. 1975)	10
American Tobacco Co. v. United States, 328 U.S. 781.	10
Apex Hosiery Co. v. Leader, 310 U.S. 469	17
Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975)	11
Columbia Metal Culvert v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978)	9
Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972)	10
Diamond International Corp. v. Walterhoefer, 289 F. Supp. 550 (D. Md. 1968)	13
FLM Collision Parts, Inc. v. Ford Motors Co., 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977)	9
George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975)	9
Greyhound Computer v. International Business Machines, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978)	12
Hunt v. Crumboch, 325 U.S. 821	17
Huron Valley Publishing Co. v. Booth Newspapers, 336 F. Supp. 659 (E.D. Mich. 1972)	11
Independent Iron Works v. United States Steel Corp., 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963)	9
Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982)	12
Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964)	9
Lorain Journal Co. v. United States, 342 U.S. 143	10,17
Mowery v. Standard Oil Co., 463 F. Supp. 762 (N.D. Ohio 1976), *aff'd*, 590 F.2d 335 (6th Cir. 1978)	9

	Page
Mt. Lebanon Motors v. Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd on other grounds*, 417 F.2d 622 (3d Cir. 1969)	11
Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832 (2d Cir. 1980)	13
N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493 (D. Del. 1971)	13
Oetiker v. Jurid Werke, G.m.b.H., 556 F.2d 1 (D.C. Cir. 1977)	9
Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977)	9
Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)	9
Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818 (6th Cir. 1982)	13
Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979)	9
Swift & Co. v. United States, 196 U.S. 375	8
Times-Picayune Publishing Co. v. United States, 345 U.S. 594	10,17
Twin City Sportservice, Inc. v. Charles O. Finley & Company, 676 F.2d 1291 (9th Cir.), *cert. denied*, 103 S.Ct. 364 (1982)	10,12
Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962)	11
United States v. Dairymen, Inc., 5 Trade Reg. Rep. (CCH) ¶ 65,651 (W.D. Ky. 1983)	13,14,19
United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977)	9,13,14
United States v. Procter & Gamble Co., 356 U.S. 677	15
United States v. United Shoe Machinery, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954)	14,15,16
United States v. United States Gypsum Co., 438 U.S. 422	18
Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172	10

	Page
White Bag Co. v. International Paper Co., 579 F.2d 1384 (4th Cir. 1974)	9
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Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)	11
STATUTES:	
Sherman Act, Section 1, 15 U.S.C. § 1	5
Sherman Act, Section 2, 15 U.S.C. § 2	2,5,7, 8,14,17, 18,19
Clayton Act, Section 3, 15 U.S.C. § 13a	14
OTHER AUTHORITIES:	
Annual Report of the Director for the Administrative Office of the United States Courts—1981 (prelim. ed. 1981)	19
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	Page
Note, "Attempt to Monopolize: The Offense Redefined," 1969 Utah L. Rev. 704 (1969)	10
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M. Porter, *Competitive Strategy* (1980)	15
R. Posner, *Antitrust Law: An Economic Perspective* (1976)	16
F. Scherer, *Industrial Market Structure and Economic Performance* (1970)	15
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L. Sullivan, *Antitrust* (1977)	14,15
D. Turner, "Antitrust Policy and the Cellophane Cases," 70 Harv. L. Rev. 281 (1956)	10
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J. Von Kalinowski, *Antitrust Laws and Trade Regulation* (1982)	17

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The Petitioners, Samuel Moore and Company and Eaton Corporation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 22, 1983.

OPINIONS BELOW

The opinion of the court of appeals is reported at 709 F.2d 980. It is reproduced in Appendix A, *infra*, pp. 1a-30a. The order of the court of appeals denying a petition for rehearing and suggestion for rehearing en banc, dated September 14, 1983, is not reported and is reproduced in Appendix B, *infra*, pp. 1b-2b. The district court's judgment, dated September 4, 1981, is reproduced in Appendix C, *infra*, pp. 1c-7c.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by order dated September 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision involved is Section 2 of the Sherman Act, 15 U.S.C. § 2, which provides as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both such punishment, in the discretion of the court.

STATEMENT

This case involves an alleged attempt to monopolize by Samuel Moore and Company ("Moore"). Moore is accused of attempting to exclude Multiflex Inc. ("Multiflex") from the United States market for hydraulic hose bundles. What makes this case unique is that during the period of the alleged attempt (just over a year), the court below found that Moore's market share plummeted from approximately 80% to slightly over 38%. During this same time, Multiflex's market share grew from zero to just under 62%.[1] Moore was not capable of excluding

[1] The court below greatly confused the issue of Moore's market share by using interchangeably two different sets of market share figures—one in which

(footnote continues)

Multiflex, even if it wanted to. Under these conditions, a charge of attempt to monopolize should fail as a matter of law.

1. Factual Background

Both Moore and Multiflex Inc. ("Multiflex") manufacture hydraulic hose bundles for use by the off-shore petroleum industry. Hydraulic hose bundles are long hoses that are bundled together in cable-like units and wrapped in sheathing material. The bundles are used mainly as links in off-shore drilling blowout prevention ("BOP") systems to connect the drilling platform to an undersea BOP device. 709 F.2d at 984; App. A at p. 2a. The market for hydraulic hose bundles is relatively small. In 1978, total sales were only approximately $1,760,000; in 1979, they were approximately $2,500,000. Plaintiff's Exhibit 190; 790 F.2d at 985; App. A at p. 5a.

Moore pioneered the business of bundling hose for use in BOP systems. It entered the business in 1961 when it was asked to assist in developing and supplying thermoplastic hoses for BOP systems. Tr. IX:46.[2] (Moore also pioneered the development of thermoplastic hose). Throughout the years, Moore developed the technology used in manufacturing hydraulic hose bundles today. Although Moore holds valid patents on some stages of its assembly process as well as on the particular type of hose which it uses, these patents are limited and the necessary technology is in the public domain.

(footnote continued)

it assumed that prior to 1979 Moore held 80% of the market and one in which it assumed that Moore held 100% of the market. The 80% figure is based upon the market definition urged by Moore, which was the worldwide market for BOP devices. The 100% figure is based upon the narrow definition of the market that was urged by Multiflex and accepted below, consisting of only those sales of hydraulic hose bundles that were made by Moore and Multiflex within the United States. The court used the 80% figure when it stated that Moore held at least 80% of the market prior to 1979, and that its market share dropped from 80% to 38%. 709 F.2d at 984, 985; App. A at 3a, 5a. But it apparently used the 100% figure when it found that Moore held 38% and Multiflex over 60% of the market in 1979. 709 F.2d at 985; Appendix A at 5a.

[2] The off-shore petroleum industry is itself a relatively new industry. Moore's innovations with respect to hydraulic hose bundles have generally paralleled innovations in the off-shore drilling industry.

Having developed the product and the industry, Moore was for some years the principal supplier of hydraulic hose bundles; its market share in 1977 was estimated to be 80%. 709 F.2d at 984; App. A at p. 3a. But its market position eroded rapidly as soon as Multiflex entered the market—within only two years thereafter, Moore's share of the market had dropped to approximately 38%. 709 F.2d at 984; App. A at p. 5a.

Multiflex entered the market in 1977. Multiflex's President, Bruce W. McConkey, had been employed as the national sales manager of the Moore division that sold hydraulic hose bundles. In 1974, McConkey left Moore to join a distributor of industrial hose which subsequently became Moore's exclusive distributor in the Houston area. In 1977 McConkey decided to produce hydraulic hose bundles in competition with Moore, and he incorporated Multiflex for that purpose. 709 F.2d at 984; App. A at p. 3a. Funded by an initial investment of $100,000 in equity, a $350,000 working capital loan from the Small Business Administration, and a subsequent $200,000 loan from a family member, McConkey formed Multiflex and mounted his rapidly successful challenge to Moore.[3]

To face this challenge, Moore attempted to maintain its sales relationships with the three original equipment manufacturers ("OEMs") who bought hose bundles from Moore and supplied turn-key BOP systems to the oil driller end-users.[4] Although Moore was apparently successful at first in persuading two of the three OEMs to continue purchasing Moore bundles, Multiflex simply went around the OEMs and began to market directly to end-users.[5]

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[3] The first separate financial statements of Multiflex, prepared as of June 30, 1978, reflect that the total equity investment at its incorporation was $100,000 and that an additional $350,000 in working capital was borrowed from the Small Business Administration. Defendant's Exhibit 68.

[4] OEMs design, manufacture, install, and guarantee turn-key BOP systems. The OEMs quote a price to the end-users for the complete system that includes hydraulic hose bundles and all other system components. The court of appeals also found that during the relevant time period, and prior to the entry of Multiflex, end-users dealt primarily with the OEMs, and not with manufacturers. 709 F.2d at 984; App. A at p. 2a.

[5] Multiflex alleged that Moore had persuaded the three OEMs to refuse to deal with Multiflex. However, Multiflex pointed to only one specific incident of a bid lost with an OEM to Moore, and the court of appeals found that the OEM involved had not agreed with Moore to exclude Multiflex from the market. 709 F.2d at 989; App. A at p. 12a.

The market positions of Moore and Multiflex shifted almost immediately. In 1978, Multiflex's total sales of hydraulic hose bundles—principally to end-users—were over $560,000, 30% of Moore's 1978 sales. By 1979, OEMs as well as end-users had begun to place orders with Multiflex, and its total sales were over $1,650,000—almost double Moore's sales. Moore had achieved a dominant market share of just under 62% of all 1979 hose bundle sales, up from a zero share at the beginning of 1978. 709 F.2d at 985; App. A at p. 5a. The demand for Multiflex's product increased so rapidly that also in 1979 it began construction of an affiliated plant in the United Kingdom which began operating in early 1980. Tr. 11:147-155.

The suit below began when Moore filed a patent infringement action against Multiflex in March, 1978. When it became clear that Multiflex and its supplier had taken steps after the first few months of production to alter the Multiflex design to avoid infringing Moore's patent, Moore dropped its patent claims. Multiflex, however, counterclaimed, alleging that Moore had conspired with the three OEMs to exclude Multiflex from the market in violation of Section 1 of the Sherman Act and had attempted to monopolize the market in violation of Section 2 of the Sherman Act.[6]

The jury found that the relevant market was the United States market for hydraulic hose bundles and that Moore had violated both Section 1 and Section 2, and a treble damage award was entered for $1,648,000.94, before costs and interest. The court of appeals reversed the jury's Section 1 finding because Multiflex had failed to establish any damage related to the alleged conspiracy.[7] 709 F.2d at 989-90; App. A at p. 13a. The court affirmed the finding of an attempt to monopolize, but it remanded for a new trial to determine the amount of the damage award allocable to the attempt claim. 709 F.2d at 993, 999; App. A at pp. 19a, 30a.

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[6] Specifically, Multiflex alleged that Moore had attempted to persuade the three OEMs not to deal with Multiflex by promising to limit its sales to end-users and to sell to end-users at higher prices than to the OEMs. In addition, Multiflex claimed that Moore had disparaged Multiflex's products to various bankers and competitors, saying that Multiflex's product was inferior and its financial condition precarious.

[7] *See* n.5, *supra*.

2. The Decision Below

The court of appeals acknowledged that "[t]he claim of attempted monopolization in this case is an unusual one" because "[r]ather than maintaining market dominance, Moore's market share plummeted from over 80% to approximately 38% in just over a year." 709 F.2d at 991; App. A at p. 15a. The court explained:

> Multiflex is arguing in effect that its own market share would have jumped from almost zero to 80%, rather than 'merely' to the 62% share it achieved in its first two years of operation.
>
> At first sight, it might strain credulity to consider imposing monopolization damages against a firm that rapidly lost, rather than gained market dominance. The claim is more surprising with the recognition that the plaintiff in this case actually gained in market power during the relevant period.

Id.

The court also acknowledged that the offense of attempt to monopolize requires "not a mere or simple risk of monopolization but a dangerous probability of success in the relevant market," 709 F.2d at 990; App. A at p. 13a, citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). But it then found that there was adequate evidence to support the jury's "implicit finding" that there was a dangerous probability of monopolization if only Moore's pre-1978 market position was considered.[8] The court explained:

> Viewing the danger from the proper time perspective, we find a sufficiently dangerous probability that

[8] The court affirmed the jury's determination that the relevant market was the United States market for hydraulic hose bundles. On appeal, Moore argued that the relevant market was the worldwide market for BOP devices, including such markets as the United Kingdom, where other manufacturers held a significant market share and where Moore's sales are minimal. However, the court concluded that "the demands of the market and of foreign governments in overseas markets makes the United States market a reasonable definition of 'relevant market' or 'relevant submarket' for the purpose of this case." 709 F.2d at 993, n.12; App. A at p. 19a.

> Moore would have maintained its monopoly power through illegal means and would have frozen Multiflex out of the market.... We find that Moore's market position in 1977 plus its overt anticompetitive acts indicate a specific intent to monopolize and created a dangerous probability that Moore would injure both Multiflex and the open public market place in violation of Section 2.

709 F.2d at 992; App. A at pp. 18a-19a. In effect, the court inferred a dangerous probability of monopolization from Moore's past (and obviously tenuous) market position and its alleged intent.

The court considered Moore's dramatically declining market share to be irrelevant. It explained, "[w]e do not accept the use of hindsight plus evidence of plaintiff's successful response to defendant's acts to exonerate an antitrust violator who did cause damage to the plaintiff." 709 F.2d at 992; App. A at p. 18a.[9]

The court did not consider the competitive structure of the hydraulic hose market either before, during, or after Moore's alleged attempt to monopolize the market. It merely assumed that Moore's pre-1978 market share represented the ability to control prices and exclude competitors from the market without considering such factors as ease of entry into the market; the small size of the market; Moore's declining market share; or the proven inability of Moore to either control prices or exclude competitors.

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[9] Moore argued that Multiflex had suffered no damages because within only a short period of time Multiflex had actually displaced Moore as the dominant supplier in the market. 709 F.2d at 994; App. A at p. 21a. But the court rejected this argument and found that

> [a]lthough Multiflex ... ended up the victor in this competitive war, this fact does not foreclose interim damages even though this victim of attempted monopolization ultimately benefitted from the monopolistic conduct. The attempt at monopolization could well have hindered or delayed the natural growth of the victim's market share.

709 F.2d at 993; App. A at p. 20a.

REASONS FOR GRANTING THE WRIT

"Dangerous probability of success" is the key to the economic rationality of the attempted monopolization offense. The proper concern of Section 2 is the defendant who can achieve monopoly power—the ability to control prices and output and exclude competitors. At least since *Swift v. United States*, this requirement has been recognized in general terms,[10] but to state the requirement is not necessarily to apply it in a way that makes economic or legal sense. This is where the lower courts, particularly the court below, have failed seriously: often finding a danger of monopoly based on market share or allegedly anticompetitive conduct alone without focusing on the factors that make monopoly more or less likely. Rationality in this area cannot be achieved unless this Court directs the attention of the lower courts to the most important factor in assessing the likelihood of monopoly: barriers to entry.

An aspiring monopolist simply cannot raise prices and restrict output if aspiring competitors may enter the market freely to take advantage of any higher profits or unmet demand. The fact that Multiflex, a new entrant, achieved a dominant market position in less than two years—even in the face of allegedly improper conduct—demonstrates dramatically the absence of any barriers to entry. This case, therefore, is an ideal vehicle to address this issue, resolve the confusion in the lower courts, and conform the scope of Section 2 liability to the scope of its economic and legal rationale.

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[10] In *Swift & Co. v. United States*, 196 U.S. 375, Justice Holmes explained that

> [w]here acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to . . . bring that result to pass, an intent to bring it to pass . . . is necessary in order to produce a dangerous probability that it will happen. . . . [W]hen that intent and the consequent dangerous probability exist, [the Sherman Act], like many others and like the common law in some cases, *directs itself against that dangerous probability* . . . .
>
> . . . .
>
> . . . Not every act that may be done . . . to produce an unlawful result is unlawful, or constitutes an attempt. *It is a question of proximity and degree.*

196 U.S. 396, 402 (emphasis added) (citations omitted).

1. The Decision Below Compounds Confusion in the Lower Courts as to the Scope of the Attempt to Monopolize Offense and What Proof of a Dangerous Probability of Success Requires.

The case law on "dangerous probability of success" has long been in an "almost anarchic" state.[11] The lower courts, with the exception of the Ninth Circuit, continue to state that a dangerous probability of success is required to support liability for attempted monopolization, but understanding and enforcement of this requirement is bewilderingly variable in the opinions.[12] The commentary emphasizes the uncertainty and

[11] "No formulation, standard or even general approach is stated or implied in nearly twenty percent of the cases . . . . One often gets the feeling that intuition alone is at work." Hawk, "Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine," 58 Cornell L. Rev. 1121, 1125, 1135 (1973) (footnote omitted). *See also,* Excerpts from Report of President Carter's National Commission to Review the Antitrust Laws and Procedures, Ch. 8 (1977), *cited in* S. Oppenheim, G. Weston & J. McCarthy, *Federal Antitrust Laws* 406-409(1981).

[12] For cases requiring some showing of a dangerous probability of monopolization, *see e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); *FLM Collision Parts, Inc. v. Ford Motors Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384 (4th Cir. 1974); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied,* 400 U.S. 939 (1979); *Mowery v. Standard Oil Co.*, 463 F. Supp. 762 (N.D. Ohio 1976), *aff'd,* 590 F.2d 335 (6th Cir. 1978); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied,* 429 U.S. 112 (1977); *Pacific Engineering & Production Co. v. Kerr McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977); and *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1 (D.C. Cir. 1977).

The Ninth Circuit expressly rejected the requirement of showing a dangerous probability of success in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964). However, the *Lessig* rule has had an unstable existence even in the Ninth Circuit. Cases decided in that circuit both before and after *Lessig* have undertaken a market analysis to determine the existence of a dangerous probability of monopoly. *See, e.g., Independent Iron Works v. United States Steel Corp.*, 322 F.2d 656, 668 (9th Cir.), *cert.*

(footnote continues)

adds to it with its own wide range of formulations, proposals, and criticism.[13]

Despite this Court's direction that defendants must possess a degree of proximity to achieving monopoly power,[14] there has been a persistent trend in the lower courts to apply a greatly reduced "power" or market position requirement, and to weaken the causal link between the "danger" they find and any real probability of the economic ills of monopoly. *See* P. Areeda, *Antitrust Analysis* ¶ 820 at 337 (1976). In addition to

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(footnote continued)

denied, 375 U.S. 922 (1963); *ALW v. United States Airlines*, 510 F.2d 52 (9th Cir. 1975); and *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). Some recent Ninth Circuit cases, however, have returned to the *Lessig* rule. *See, e.g., Twin City Sportservice v. Charles O. Finley & Company*, 676 F.2d 1291, *cert. denied*, 103 S.Ct. 364 (1982).

[13] *See, e.g.*, Cooper, "Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two," 72 Mich. L. Rev. 373 (1974); Hawk, "Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine," 58 Cornell L. Rev. 1121 (1973); Hibner, "Attempts to Monopolize: A Concept in Search of Analysis," 34 Antitrust L.J. 165 (1967); Smith, "Attempt to Monopolize: Its Elements and Their Definition," 27 Geo. Wash. L. Rev. 227 (1958); P. Areeda, *Antitrust Analysis* 177 (1967); Blecher, "Attempt to Monopolize Under Section 2 of the Sherman Act: 'Dangerous Probability' of Monopolization Within the 'Relevant Market,'" 38 Geo. Wash. L. Rev. 215 (1969); D. Turner, "Antitrust Policy and the Cellophane Cases," 70 Harv. L. Rev. 281 (1956); D. Turner, "The Scope of 'Attempt to Monopolize,'" 30 Record 487 (1975); Note, "Prosecutions for Attempts to Monopolize: The Relevance of the Relevant Market," 42 N.Y.U. L. Rev. 110 (1967); Note, "Attempt to Monopolize: The Offense Redefined," 1969 Utah L. Rev. 704 (1969); Note, "Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite for a Prima Facie Case," 73 Colum. L. Rev. 1451 (1973).

[14] In *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, the Court made clear that a court must analyze a defendant's power within the relevant market to determine whether the defendant possesses the requisite proximity to monopoly power. It explained that "[t]o establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to *appraise the exclusionary power* of the illegal [conduct] in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure . . . *ability to lessen or destroy competition*." 382 U.S. at 177-78 (emphasis added). *See also American Tobacco Co. v. United States*, 328 U.S. 781; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143.

the Ninth Circuit, which has expressly rejected any requirement of a dangerous probability of success, other courts have allowed anticompetitive acts from which intent may be inferred to substitute for a showing of power.[15] Some courts have used extremely narrow market definitions (including even a single product or brand), which have the effect of greatly overstating the defendant's "market" position.[16] *See also Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 586 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962) (refusing to reverse a jury verdict against the defendants when the instruction omitted the dangerous probability requirement even though the court found that to have included the requirement would have been "literally correct"); *Mt. Lebanon Motors v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd on other grounds*, 417 F.2d 622 (3d Cir. 1969) (refusing to direct a verdict for a defendant accused of predatory competition with plaintiff Dodge dealers by subsidizing other Dodge dealers in the market even though the court recognized that the defendant could not have successfully monopolized the market even if it took over all of the sales of Dodge automobiles in the market.)

The most egregious decisions are those which, like the decision below, find a dangerous probability of monopolization even though the defendant's market share actually declined during the period of the alleged attempt. In some instances, like the case below, the courts have ignored evidence of a declining market share and stubbornly found a dangerous probability

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[15] *See, e.g., Huron Valley Publishing Co. v. Booth Newspapers*, 336 F. Supp. 659, 662 (E.D. Mich. 1972) (stating that a "dangerous probability exists when a defendant has sufficient market power *and* a specific intent to achieve monopoly," but nevertheless finding that a defendant who could "hardly be said to enjoy market power" could still be found guilty of an attempt to monopolize if he has "engaged in acts . . . so anti-competitive that an intent to monopolize may be inferred" (emphasis added)).

[16] *See, e.g., Woods Exploration & Producing Co. v. Aluminum Co.*, 438 F.2d 1286, 1303-07 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (defining market as production of gas from a single Texas gas field); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975) (market identified as retail sales of a single brand of automobile).

despite the inherent logical inconsistency.[17] The reasoning of the decision below—finding the defendant's declining market share to be "irrelevant"—simply cannot be squared with a real appreciation of what monopoly power means or the decisions which reflect such an appreciation.[18] Comparison with the cases which have recognized the significance of a defendant's declining market share makes this apparent.

A number of cases have recognized the significance of a defendant's declining market share. In *Lektro-Vend Corp. v. Vendo Corp.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982), for example, the plaintiff alleged that the defendant had attempted to monopolize the relevant market through conduct occurring in 1959 and 1965. The court affirmed a finding that there was no dangerous probability of

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[17] *See also Greyhound Computer v. International Business Machines*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (holding that proof of a dangerous probability of success is not an independent element of attempt to monopolize and affirming the jury's finding of an attempt where the defendant's market share had declined from 82.5% in 1964 to 64.68% in 1970 and was continuing to decline); *Twin City Sportservice, Inc. v. Charles O. Finley & Company*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 103 S.Ct. 364 (1982) (failure to consider evidence that the defendant's market share had declined and the number of competitors and size of the market had increased dramatically). *Cf. William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57, 58 (1982) (finding a dangerous probability of success even though the defendant had a static 22% market share and the dominant firm had increased its market share from 41% to 52%).

[18] The court below found that the dangerous probability that Moore would maintain its alleged monopoly did not materialize "only because of the quality of Multiflex's product and the dedicated and imaginative way the company built a market for it." 709 F.2d at 993; App. A at p. 19a. Under classic formulations of common law attempt doctrine, an attempt is constituted by acts which, but for some intervening factor, would have resulted in consummation of the crime. Here, the court confusedly implies that the intervening "factors" which prevented Moore's acts from maturing into monopoly power were its superior product and marketing techniques. But to say this is to say only that Moore lacked the market power to prevent such competition on the merits by Multiflex, and that the better product "won". It is both confusing and misleading to suggest that Multiflex's very entry into the market was the intervening factor that prevented Moore from maintaining a monopoly in that market.

monopolization because the defendant's market share had dropped from 33% in 1966 to 24% in 1973, its profits had steadily declined, and it had experienced substantial losses in each of the four years preceding the trial. The court explained that evaluating dangerous probability "requires an appraisal of the alleged offender's *ability to achieve the forbidden result*" because, "[i]n an antitrust context, ... [t]he ultimate concern is the firm's actual or threatened impact on competition in the relevant market," 660 F.2d at 271, (citing *Kearney & Trecker Corp. v. Griddings & Lewis, Inc.*, 452 F.2d 279 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972)). As the Sixth Circuit likewise concluded when it was faced with a decline in defendant's market share from 40% to 30% in the relevant period, this evidence "belie[d] whatever inference of capacity to monopolize that may be drawn from the size of its market share," *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982).[19]

The critical importance of barriers to entry in this analysis is identified in *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).[20] There, the court held that a finding of intent to monopolize along with a 50% share of the market for LP gas was insufficient to establish a dangerous probability of monopolization because the market was highly competitive and there were minimal barriers to entry—all that was needed to enter the market was a supply of LP gas, a truck, and perhaps a storage tank.

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[19] *See also Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980) (decline in defendant's market share from 54.5% to 33% over a five year period following the occurrence of conduct which facilitated the alleged attempt); *Diamond International Corp. v. Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968) (finding no dangerous probability of success where there was a decline in the defendant's market share from 52% to 51% during the period of the alleged attempt); *N.W. Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971) (rejecting a claim of an attempt to monopolize where the defendant's market share had declined from 68% to 32%, although this decline was apparently used by the court to find a lack of specific intent, rather than to find an absence of dangerous probability).

[20] The District Court for the Western District of Kentucky recently identified explicitly the importance of barriers to entry in *United States v.*

(footnote continues)

The conflict in approach presented by the decision below is clear and decisive. Had the reasoning of the foregoing cases been applied, Moore could not have been found guilty of an attempt to monopolize. The record demonstrates that there were no barriers to entry to the market for hydraulic hose bundles. Moreover, the fragility of Moore's market position shows that Moore did not possess, nor was it ever likely to possess, the significant market power with which Section 2 is concerned. In finding otherwise, the court below, like so many lower courts, has mouthed the words of the proper legal standard, but completely ignored the most relevant facts. The decision below thus perpetuates and increases the confusion and conflict among the circuits that has characterized this area of the law for too long.

2. This Court Should Make Clear That a Finding of a Dangerous Probability of Monopoly Cannot Properly be Made Without Evaluating the Presence or Absence of Significant Barriers to Entry in the Relevant Market.

No matter how large its market share, a firm can achieve or maintain monopoly power only if its market is insulated from rapid and easy entry by others. *See* L. Sullivan, *Antitrust* § 23 at 79 (1977); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). If a firm attempts to exact a monopoly price in a market where there are no significant barriers to entry, new

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(footnote continued)

Dairymen, Inc., 5 Trade Reg. Rep. (CCH) ¶ 65,651 (W.D. Ky. 1983). The court found that the defendant had violated Section 3 of the Clayton Act and had a specific intent to monopolize the market, but that the government had failed to establish a dangerous probability of monopolization. The court emphasized that during the relevant time period, the cooperative's share of the market decreased from 60.1% to 48.6%, a competitor was selling at prices lower than the cooperative and continued to do so, and the cooperative had been unable to exclude the competitor from the market. The court explained that the central considerations in an attempt to monopolize claim are "whether or not there was a dangerous probability that the defendant could control prices in the relevant market" and "whether or not the defendant had the power to effectively exclude competitors from the market," 5 Trade Reg. Rep. (CCH) ¶ 65,651 at 69,299-38 (W.D. Ky. 1983), citing *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

entrants will be attracted and will capture a portion of the market by selling at a competitive price.[21] In fact, "[i]f the industry is one in which . . . outsiders could rapidly enter if prices were pushed significantly above competitive levels even a share as large as 90% . . . may not confer massive power." L. Sullivan, *Antitrust* § 23 (1977).

The principal sources of barriers to entry are: (1) legal licenses such as governmental franchises, patent monopolies, and trade secret protection; (2) control over essential or superior resources; (3) entrenched buyer preferences; (4) capital market evaluations imposing higher capital costs on new entrants than on established firms; (5) economies of scale; and (6) physical product differentiation.[22] *See* P. Areeda & D. Turner, *Antitrust Analysis* ¶ 409 at 299; L. Sullivan, *Antitrust* § 23 at 77-79 (1977); R. Bork, *The Antitrust Paradox* 311 (1978); *Cf. United States v. United Shoe Machinery*, 110 F. Supp. 295 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. Procter & Gamble Co.*, 356 U.S. 677.[23] Barriers to entry are significant in an antitrust context when

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[21] Entry may still be deterred if the firm charging the supracompetitive price has excess capacity that would be sufficient to supply the demand at a competitive price. Potential entrants may then be deterred because they believe entry will create excess capacity leading to below average-cost pricing. *See* P. Areeda, *Antitrust Analysis* ¶ 409a at 299 (1967). However, the record below clearly demonstrates that there was no excess capacity in the market. In fact, in order to keep up with increased demand for its product, Multiflex had to construct a second plant only two years after its first plant became operational. Moreover, Multiflex has never claimed that Moore priced its product below cost, or that Multiflex was forced to do so to remain competitive.

[22] A firm's market share is less significant where the relevant product is homogeneous because it is easier for other firms to compete on the basis of price. *See* F. Scherer, *Industrial Market Structure and Economic Performance* 186-192 (1970). Firms are more likely to succeed in increasing their market share by reducing their prices where price is the predominant plane of competition and cross elasticity between suppliers is very high, and this condition exists where the product market is not highly differentiated. *See* L. Sullivan, *Antitrust* § 24 at 80 (1977).

[23] *See also* M. Porter, *Competitive Strategy* (1980), which lists six major sources of barriers to entry: (1) economies of scale; (2) product differentiation; (3) capital requirements; (4) switching costs (*i.e.*, " one-time costs

(footnote continues)

they permit a firm to exclude from the market equally or more efficient competitors.[24]

Multiflex's ability to convert a zero market share to 62% in only thirteen months dramatically and incontrovertibly demonstrates that there were no significant barriers to entry to the market for hydraulic hose bundles. There were neither economies of scale nor government restrictions, and Moore had no control over essential or superior resources needed in the manufacture of the bundles. The market for hydraulic hose bundles is not highly differentiated. Multiflex required an initial capital investment of only $450,000, and it has never claimed that it was forced to pay more to attract those funds than Moore has had to pay. Although Moore held patents on

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(footnote continued)

facing the buyer of switching from one supplier's product to another's"); (5) access to distribution channels; and (6) cost disadvantages independent of scale (including proprietary product technology, favorable access to raw materials, government subsidies, and the learning or experience curve).

The significance of barriers to entry was illustrated in *United States v. United Shoe Machinery*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). The district court found that the defendant had a market share of between 75% and 95%, but refused to predicate its finding of market power on market share alone. Instead, the court identified numerous barriers to entry which, along with the defendant's market share, indicated market power, including: an accumulation of many patents which by their number and complexity would deter an entrant from attempting to innovate around the patents to enter the market (*Id.* at 332-33); a discriminatory pricing policy under which returns on simple machines most likely to attract entrants were kept low, and returns on more complex machines were kept high (*Id.* at 325-29); static or declining aggregate industry demand which made the industry unattractive to new entrants (*Id.* at 301); and various market practices (such as a "lease only" policy which encouraged a firm which leased one of the defendant's machines to lease other machines from it as well) (*Id.* at 314-15).

[24] *See* R. Bork, *The Antitrust Paradox* 310-329 (1978) (distinguishing between "natural" efficiency-related barriers to entry which are not the subject of the antitrust laws and "artificial" barriers to entry which are unrelated to the relative efficiency of competitors); R. Posner, *Antitrust Law: An Economic Perspective* 188 (1976) (defining predatory pricing as "pricing at a level calculated to exclude from the market an equally or more efficient competitor." The concept of barriers to entry in the context of predatory pricing is the same as with regard to attempted monopoly—both involve unilateral behavior aimed at excluding competitors from the market).

some of its assembly processes and a particular type of hose it used, Multiflex was able to develop a comparable non-infringing innovation within only a couple of months after beginning production. It has never claimed that its costs of doing so exceeded Moore's own development costs. In sum, the record completely fails to show that there were any barriers to entry to the market. This inescapably leads to the conclusion that Moore did not have the power to control prices or exclude competitors—a conclusion most dramatically illustrated by Multiflex's own performance.

This Court should make clear that in determining whether a dangerous probability of monopolization exists, it is essential to examine the allegedly threatened market. If the market is not characterized by significant barriers to entry—such as the market in this case—then there is no dangerous probability of monopolization as a matter of law.

3. This Court Should Forestall the Growing Use of Section 2 of the Sherman Act as a General Code of Unilateral Business Conduct.

This and similar decisions below, which divorce Section 2 attempt liability from any real examination of market impact, fuel the growing use of Section 2 as a general statutory prohibition of unfair competition.[25] This Court should act to forestall that tendency.

Market power is central to the attempt offense for compelling practical and legal reasons. First, failure to assess the defendant's actual power to achieve a monopoly in the market leaves "virtually no perimeters on the prohibitions of Section 2." J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2], n.32 (1982). Moreover,

> it does not seem possible in any rational scheme to avoid entirely the question of the degree of power. In

[25] P. Levine, "Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case," 73 Colum. L. Rev. 1451, 1467 (1973); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512; *Hunt v. Crumboch*, 325 U.S. 821; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594; *Lorain Journal Co. v. United States*, 342 U.S. 143.

> assessing restrictive business conduct that is at the same time ancillary to competition on the merits, the degree of market power seems inescapably relevant.

P. Areeda & D. Turner, *Antitrust Law* at §§ 831, 833d (1978). *See also* Smith, "Attempt to Monopolize: Its Elements and Their Definition," 27 Geo. Wash. L. Rev. 227, 235 (1958). Refusal to look at market power allows a court to decide "intuitively," without any intelligible basis, that a competitor's conduct was "unfair," and that it therefore was an "attempt to monopolize," without ever linking the unfairness to any real risk of monopoly power, and even without considering evidence that there was no link.

Second, as Professors Areeda and Turner note, "whatever our desire to police 'improper' behavior may be, we are nonetheless faced with a statute which uses the word 'monopoly,' and with years of interpretations which tie that word to conceptions of true market power." P. Areeda and D. Turner, *Antitrust Law* ¶ 833d (1978).

Third, and perhaps most importantly, applying Section 2 without regard to the defendant's actual ability to achieve or maintain monopoly power can have a devastating affect on the very competition Section 2 is intended to promote. Minor degrees of market power resting on product differentiation, the defendant's status as a pioneer in the industry, and other such factors are not only pervasive, but perfectly acceptable and normal by-products of the competitive process. A general disregard for market power (or a general lowering of the threshold degree of market power required) would thus threaten "overdeterrence [of] salutory or procompetitive conduct," *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41.

Finally, the practical importance of this issue is demonstrated by the frequency and ease with which attempt to monopolize claims are advanced. As Professors Areeda and Turner have noted, "[t]he lure of treble damages and attorney's fees—without the common law's limitations on tort liability and proof of damages—will transform every state tort claim into a federal

treble damage action." P. Areeda and D. Turner, *Antitrust Law* ¶ 833.[26] The potential plaintiff can plead any conduct by a substantial participant in the market; there is precedent for finding a danger of monopoly in an appreciable market share alone; and there is no definitive guidance which tells the lower courts that a Section 2 defendant must have the wherewithal to become—or remain—a "monopolist."

The need for guidance on the limits of Section 2 has long been recognized in the cases[27] and by the commentators.[28] This Court should take the opportunity to articulate the proper scope of Section 2 and the nature of the proof required to demonstrate the existence of a dangerous probability of monopolization.

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[26] The experience of the Ninth Circuit illustrates the disproportionate frequency of attempt claims when no realistic dangerous probability of success is required to be shown. In fiscal year 1981, more antitrust appeals were taken to the Ninth Circuit than to any other circuit—135 of 391, or 35% of all such appeals. *See* Annual Report of the Director for the Administrative Office of the United States Courts—1981, Table B7, at A-12 (prelim. ed. 1981). By expressly eliminating the requirement of showing a dangerous probability of monopolization, the Ninth Court has "encouraged a greater number of . . . suits where evidence of market power is all but nonexistant . . . . [It] has written over thirty opinions on this one topic since . . . [1964], or more than one third of all the appeals reported on attempted monopolization during that time in all the circuit courts." Handler & Steuer, "Attempts to Monopolize and No Fault Monopolization," 129 Pa. L. Rev. 125, 174 (1980).

[27] *United States v. Dairymen, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 65,651 at 69,299-38 (W.D. Ky. 1983) (noting that "[t]he courts have had a great difficulty in articulating the standard by which a dangerous probability of success is measured").

[28] *See* n.13, *supra*.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 13, 1983

APPENDIX A
FIFTH CIRCUIT COURT OPINION

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 81-2405

MULTIFLEX, INC.
Plaintiff-Appellee,

v.

SAMUEL MOORE & COMPANY, AND
EATON CORPORATION,
Defendant-Appellants.

Max Hendrick, III, Stephen C. Tarry, Houston, Tex., for defendants-appellants.

Bernarr Roe Pravel, Thomas F. Marsteller, Jr., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before WILLIAMS and JOLLY, Circuit Judges, and WILL*, District Judge.

JERRE S. WILLIAMS, Circuit Judge.

This is an antitrust case under sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, seeking damages under section 4 of the Clayton Act, 15 U.S.C. § 15. The plaintiff, Multiflex, Inc., is a relatively new corporation that manufactures hydraulic hose bundles for use in oilfield drilling

* District Judge of the Northern District of Illinois, sitting by designation.

equipment. The defendant, Samuel Moore & Co.,[1] is a long-established maker of similar hydraulic hose bundles and other technical industrial hoses. At trial, Multiflex sought monetary damages for conspiracy in restraint of trade and attempted monopolization. The district court entered judgment of $549,362.98 before trebling.[2] We affirm in part, reverse in part, and remand.

I. THE STAGE SETTING

A. The Industry in Perspective.

Hydraulic hose bundles are sets of long, high-pressure hoses that are bundled, or wrapped, with plastic or other sheathing substances to produce an integral, cable-like unit. The main use for these bundles is in the oilfield equipment industry, where they are used as a component of blow-out prevention (BOP) systems. BOP devices are sophisticated, high-pressure hydraulic systems designed to monitor oilfield activities to prevent blow-outs.

The market for BOP devices is dominated by three original equipment manufacturers (OEMs), which design, manufacture, install, and guarantee a virtual turn-key system. The OEMs quote a price to the end users for a complete system that includes hydraulic hose bundles and all other system components. The OEM benefits under this "total systems" approach because it can tack a profit margin onto its wholesale cost for the hose bundles and other system components. The end user benefits from the simplicity of buying from a single

[1] Shortly before trial, Samuel Moore & Co. was acquired by the Eaton Corporation and ceased to exist as a separate corporate entity. However, for clarity's sake, the district court referred to the defendant as Samuel Moore & Co., a convention we adopt in this opinion as well. Eaton Corp. has been properly named a party to this proceeding.

[2] The jury awarded damages of $382,963.07 under the conspiracy claim and $205,964.73 under the attempted monopolization claim, for a total of $588,927.80 before trebling. However, before the entry of judgment Multiflex filed its consent to reduce damages under the verdict to $549,362.98. The district court entered judgment for this reduced figure on September 4, 1981, five days after the jury's verdict. Damages were then trebled to $1,648,088.94. The damages figure is discussed further in Part IV of this opinion.

vendor and relying on a single guarantee. Although an end user occasionally buys original hoses or replacement bundles directly from the manufacturer, most sales of hydraulic hose bundles are made through the OEMs as middlemen.

B. The Parties in Perspective.

The company credited with establishing the hydraulic hose bundle market is Samuel Moore & Co. (Moore). Moore holds a patent on its method of bundling the cables, [3] and has been at the forefront of helping the OEMs incorporate these hose bundles into their BOP systems. For many years up until 1978, Moore enjoyed a dominant position in the hydraulic hose market, controlling at least an 80% share of the U.S. market. [4]

Bruce W. McConkey, the President of appellee Multiflex, Inc., worked for Samuel Moore & Co. from 1964 to 1974. His ultimate position was national sales manager of the Synflex division, the Moore unit that sold hydraulic hose bundles. In 1974, McConkey left Moore and became associated with Flow Products of Houston, Inc., an industrial distributor. Due to McConkey's close and friendly relationship with Moore, Synflex dropped all other distributors in the Houston area and appointed Flow Products its exclusive distributor in this major market. This arrangement continued amicably for three years.

In 1977, McConkey decided to start producing hydraulic hose bundles in competition with Moore. He contracted with Gates Rubber Co. to arrange for a dependable supply of hosing, and made other preliminary arrangements. The new company, called Multiflex, Inc., was incorporated in March, 1977. Its first business goal was to purchase basic hosing from Gates Rubber Co., sheathe the hosing into bundles, and sell the hydraulic hose bundles as oilfield equipment.

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[3] U.S. Patent No. 3,905,398.

[4] The parties dispute Moore's exact share of the "relevant market," as that market is defined in this case. Multiflex asserts a virtual 100% stranglehold on the market until 1978, while Moore admits to "at least an 80-85% market share." Either figure, however, is sufficient to establish market dominance for the purposes of this case.

Moore learned of Multiflex's existence in May, 1977, at which point Moore and McConkey reached a peaceable agreement to terminate Synflex's distributorship with Flow Products due to conflicts of interest. Multiflex was still making preparations for production at that point, and did not achieve manufacturing capability until November 1, 1977.

C. The Competitive Process in Perspective.

Multiflex approached the three OEMs in late 1977, just before it developed production capability. It hoped to show that its superior product at lower cost was a better deal than Moore's bundles. But the OEMs placed no orders with Multiflex at this time, preferring to remain loyal to Moore. Earlier entrepreneurial attempts to enter this market had met a similar lack of success.

In October, 1977, a Dallas-based drilling company, the Sedco Co., was in the market for a hydraulic hose bundle. Multiflex approached Sedco to offer its product, and Sedco was interested in a price quote. Multiflex, however, claims it asked Sedco to obtain a quote directly from the OEM that would be manufacturing the complete device, because it did not wish to disturb the established channels of distribution. Sedco obtained a quote for a Multiflex bundle from the OEM.

Moore, learning of the Multiflex bid, then submitted a lower-than-normal bid directly to Sedco, bypassing its normal distributor network. The price was slightly higher than the OEM bid based on the use of the Multiflex bundle. Moore pressured the OEM to promote the Moore product. The evidence shows that the Multiflex product was at least equal in specifications to the Moore bundle, and that Multiflex, unlike Moore, was able to promise the required short delivery time. Nevertheless, a Moore bundle was used on the Sedco job. This lost sale was later used as evidence of Multiflex's "fact of damage" in its antitrust charges.

Multiflex made a few small sales in 1977, but decided that to remain competitive it would need to bypass the traditional marketing structure utilizing the OEMs and approach the end users directly. The end users, mostly offshore drilling con-

tractors, were quite favorably impressed with the new Multiflex line, and 1978 sales totaled over $560,000, mostly to end users. Eventually, even the OEMs began placing some orders through Multiflex. Multiflex expanded in the U.S., and established a manufacturing facility in the United Kingdom. In 1979, Multiflex's sales totaled over $1,650,000, almost doubling Moore's 1979 sales of approximately $850,000. By 1979, Multiflex was the dominant supplier in the U.S. market for hydraulic hose bundles with over a 60% market share, while Moore's share dropped from over 80% to approximately 38%.

Throughout, Moore had kept a careful eye on the upstart competitor sired by its former employee. When Multiflex bought its first hose from Gates Rubber Co. and produced its first hydraulic hose bundles, Moore closely investigated the completed bundles to see if they infringed upon the Moore patent covering many aspects of hydraulic hose bundle design and manufacture. After an investigation and a call to its patent attorneys, Moore filed a patent infringement action against Multiflex on March 22, 1978.

Multiflex answered the suit by denying the patent infringement charges and counterclaiming with several antitrust charges. It later became clear that Gates and Multiflex had taken steps after the first few months of production to change the Multiflex design and eliminate any possibility of patent infringement. Moore eventually dropped its patent claims. Multiflex, however, continued to pursue its antitrust charges. Its amended complaint included claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and the treble damages provision of section 4 of the Clayton Act, 15 U.S.C. § 15. The parties were appropriately realigned, and these antitrust claims constitute the present suit. Jurisdiction in the district court was proper under 15 U.S.C. § 15.

The case was presented to a jury in a trial lasting six weeks. The jury found the relevant market to be the U.S. market for hydraulic hose bundles; found section 1 liability and awarded section 1 damages of $382,963.07; found section 2 liability and awarded section 2 damages of $205,964.73. Multiflex accepted a slightly-reduced judgment of $549,362.98 and amended its

pleadings to conform with the verdict. The trebled award was entered for $1,648,088.94, before costs and fees. The trial court denied motions for judgment n.o.v. or new trial. Moore files this timely appeal, 28 U.S.C. § 1291.

II. SECTION 1 CLAIM

Multiflex charges that Moore entered into a conspiracy in restraint of trade, in violation of section 1 of the Sherman Act. It alleges that Moore met with the three OEMs during the early days of Multiflex's existence to convince the OEMs not to enter into contracts with Multiflex.[5]

A. The Applicable Law.

Under the Sherman Act, conspiring in restraint of trade is illegal, even if the conspiracy does not in fact lead to an actual restraint of trade. *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96, 98 (1st Cir. 1932). Unlike a contract or other combination in restraint of trade, a conspiracy violates the Sherman Act ever without proof of injury because of the surreptitious, pernicious effect a conspiracy ultimately can have upon a free market. Violation of the Sherman Act is therefore not dependent on damage, although no damages can be

[5] The OEMs, Multiflex's best customer prospects, are not named in this suit. It is easy to see how Multiflex would hinder its long-term success in the marketplace if it sued its intended customers. "The antitrust laws do not require a business to cut its own throat." *Brown* v. *Western Mass. Theatres, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961). However, a conspiracy charge need not be filed against all co-conspirators to be valid. A conspiracy conviction may lie against a single indicted party, even though the legal definition of conspiracy requires two or more persons acting in concert. *United States* v. *Albert*, 675 F.2d 712 (5th Cir. 1982); *United States* v. *Sheikh*, 654 F.2d 1057 (5th Cir. 1981), *cert. denied*, 455 U.S. 991, 102 S.Ct. 1617, 71 L.Ed.2d 852 (1982) (conspiracy defendant may be convicted of conspiring with unindicted parties if the evidence supports their existence and the existence of a conspiracy). *Cf. Herman* v. *United States*, 289 F.2d 362 (5th Cir.), *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961) (conspiracy conviction may not lie against only one of several indicted parties in a *combined* trial); *United States* v. *Davila*, 698 F.2d 715 (5th Cir. 1983) (conspiracy conviction may lie against one of several indicted parties in *severed* trials).

recovered unless proved. Federal law does not provide for automatic monetary damages as an antitrust remedy. *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F.2d 575, 578 (5th Cir.), *cert. denied*, ____U.S.____, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982) (discussing § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a)), *citing Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

The term restraint of trade could not cover all possible restraints, or else the antitrust laws would eliminate the entire system of commerce. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948). Rather, the term includes two types of unlawful acts. The major category, *unreasonable* restraints of trade, includes business practices that violate general principles of fair dealing and free trade. The legal standard, generally called the rule of reason, leaves the ultimate determination of reasonableness to a jury. The prohibited acts are those with a threatened impact on competition. *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). The inquiry concerns effect on *competition*, not on *competitors*.[6] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 300, 82 S.Ct. 1502, 1510, 8 L.Ed.2d 510 (1962); *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir.), *cert. denied*, 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 102 (1981). *Almeda Mall, Inc.* v. *Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870, 101 S.Ct. 208, 66 L.Ed.2d 90 (1980). The legality of most restraints of trade, including the vertical market restrictions at issue in this case, is determined under the rule of reason analysis.

Some violations, however, are so damaging to a system of free and open competition and so devoid of legitimate business purpose that courts have labeled them per se violations not

[6] While the section 1 rule of reason analysis requires an impact on completion, section 4 of the Clayton Act requires evidence of private injury to support a private sector recovery. A private plaintiff pursuing a restraint of trade case therefore must prove both marketplace and private injury at some point in the case. Yet such evidence may overlap, since evidence or injury to a competitor may suggest damage to the competitive marketplace.

subject to the rule of reason. *E.g., Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). These per se claims, including price fixing and horizontal exclusions from the marketplace, *see United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed. 2d 515 (1972), are not involved in the case before us. The parties have stipulated that all restraints of trade alleged in this case are subject to the rule of reason. *Continental TV, Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549 53 L.Ed.2d 568 (1977); *Affiliated Capital Corp.* v. *City of Houston,* 700 F.2d 226 (5th Cir. 1983).

Even though a conspiracy in unreasonable restraint of trade may be proved, to justify a private suit the plaintiff must additionally demonstrate injury under the standard of section 4 of the Clayton Act, 15 U.S.C. § 15. *McClure* v. *Undersea Industries, Inc.,* 671 F.2d 1287, 1289 (11th Cir. 1982), *cert. denied,* ____U.S.____, 103 S.Ct. 1427, 75 L.Ed.2d 788 (1983); *Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309, 317 (5th Cir. 1978). Under section 4, such a showing of injury requires proof of the "fact of damage" and some general proof as to the amount of damage. *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307, 1320 (5th Cir. 1976); *Kestenbaum* v. *Falstaff Brewing Corp.,* 514 F.2d 690, 695 (5th Cir. 1975), *cert. denied,* 424 U.S. 943, 96 S.Ct. 1412, 47 L. Ed.2d 349 (1976). A violation without private injury to the plaintiff cannot support an award of money damages under section 4, even though the defendant's behavior could support injunctive relief, a monetary award in favor of another private plaintiff, or a judgment in favor of the United States as parens patria. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130-31, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969).[7] With this general statement of the law as a backdrop, we turn to the section 1 claims involved in this case.

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[7] In *Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309, 317 & n. 17 (5th Cir. 1978), we explained the distinction between a Sherman Act violation and private recovery:

> Proof of a violation of the Sherman Act standing alone does not establish civil liability under § 4 of the Clayton Act. There must

(footnote continues)

B. The Conspiracy and the Rule of Reason.

Multiflex alleged at trial that Moore met with the principal customers for hydraulic hose bundles (the three OEMs) and conspired to keep Multiflex out of the market by suggesting exclusive and profitable arrangements between Moore and the OEMs. The allegation is supported by several internal Moore memos. One such memo, dated October, 1977, acknowledges that Moore is no longer alone in the relevant market, and that the company must decide "just exactly how we are going to structure ourselves for this onslaught." It considers as one course of action a meeting with the three OEMs to "see what we can all do to keep these other guys out of it."

Another Moore memo, dated January, 1978, reports meetings in that same month between Moore and the OEMs at which the business activity of Multiflex was discussed. The memo claims that at these meetings, two of the three OEMs agreed not to buy bundles from any source other than Moore. All three OEMs stated, according to the Moore memo, that they hoped the days of high profit margins would return, "but for the most part it is a war situation now." The memo concluded that Moore believed the OEMs would support its plans to keep Multiflex from gaining a toehold in the market:

> We are thinking over everything that was said there and how the three meetings went, and the probability is that we will go forward with the plan as

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(footnote continued)

> under § 4 be proof of "injury to business or property" before a Sherman Act violation becomes cognizable as a private civil remedy. . . . [A]wareness of the distinction between conduct which violates § 1 of the Sherman Act, and the elements which establish liability in private party litigation under § 4 of the Clayton Act, is vital.

An example of the importance of this distinction would be a conspiracy to establish *maximum* prices. This form of price-fixing would clearly violate the Sherman Act, see, *e.g. Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), but would not be a cognizable action under § 4 on behalf of retail customers because they most likely would not have suffered injury as a result of such acts. (Emphasis in original.)

> we took it to Houston. We will have the support of [two of the OEMs]; however, we are not certain of the support we'll get from [the third]. It is essential to counteract McConkey's work and to try and cause him to lose every single thing that he bids, as he will only get stronger. This may indeed cause us to go much, much lower than we would care to go; however, the objective is to try and remain in the number one position in this business.

The various Moore memos suggest that Moore initiated a conspiracy with the three OEMs to exclude Multiflex from the market and retain its market dominance. In return, Moore offered the OEMs the promise of higher profit margins by agreeing to limit its direct sales to end users and to sell at "substantially higher prices to end users than to the OEMs."

Witnesses at trial provided further evidence of restraints in trade performed for the sole purpose of destroying Multiflex. An antitrust conspiracy is rarely shown by direct evidence, and usually is proved by inference and suspicion, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948). It is "enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Interstate Circuit* v. *United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610 (1939). In this case, however, the plaintiff was able to produce the defendant's own "smoking guns" with the result that there was ample evidence of a conspiracy to restrain trade.

Even though the existence of conspiracy is demonstrated, the proof must still show the intended restraint was unreasonable. The question of reasonableness is a fact question for the jury. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). There is sufficient evidence to uphold the jury's determination in this case that the restraint was unreasonable. The record suggests that Moore set up its meetings with the OEMs in an attempt to keep Multiflex out of the market. The OEMs realized that compliance with Moore's proposals would mean greater profits for themselves as direct-dealing competitors to Moore were

eliminated. The goal of the conspiracy was to eliminate one of the only two manufacturers. While the conspiracy was in force, customers were discouraged from buying from anyone other than Moore. This evidence forms a proper basis for a jury to find an unreasonably dangerous effect on competition.

As in any case with sufficient merit to survive motions for summary judgment and reach a jury, there is evidence in this case to support a contrary result. Moore claims it was only meeting with its customers to apologize for the occasional need to make direct sales to end users with the effect of "freezing out" the OEMs as to those sales. It claims the OEMs were amenable to exclusive dealings with Moore based only on lawful considerations such as reliability in deliveries and quality of products. However, our role as an appellate court is not to adjudge the evidence de novo. We must affirm factual findings that are in accordance with the law and supported by credible evidence. There is sufficient credible evidence that Moore played the organizing and dominant role in a conspiracy undertaken to achieve an unreasonably dangerous effect on competition. We find that the record supports the claim of violation of section 1 of the Sherman Act.

C. Fact of Damage.

To obtain any private monetary award based on the violation of section 1, a plaintiff must prove an injury to its business or property, the so-called "fact of damage." The fact of damage showing does not require the antitrust plaintiff to prove with particularity the full scope of profits that might have been earned in the absence of unlawful activity in restraint of trade. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 45-46 (5th Cir.), *cert. denied*, 409 U.S. 2077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). It requires only that a plaintiff show with some particularity an element of actual damage caused by the defendant's violations of the antitrust laws. [8] We

[8] The "fact of damage" is an element of the plaintiff's burden of proof, which requires a showing by a preponderance of the evidence. Once the fact of damage is shown, a jury may use its discretion in determining the exact

(footnote continues)

find that this prerequisite to a damage award was not met in the conspiracy proved under Section 1 of the Sherman Act.

To show the fact or damage, Multiflex points to the October, 1977, Sedco bid, where Multiflex presented substantial evidence that it was not given an opportunity to compete fairly for the job. Multiflex showed that it would have provided quality bundles at a lower cost than Moore with guaranteed fast delivery as required, but that Moore's anticompetitve maneuvers kept Multiflex from winning the bid. Overall, the evidence supports the inference that Multiflex would have earned this Sedco job in the absence of Moore's misconduct. The evidence also shows, however, that the OEM manufacturing the complete device for Sedco did not join with Moore in the attempt to freeze out Multiflex. The OEM quoted Sedco a competitive price on the Multiflex bundle and refused pressures from Moore employees to badmouth the Multiflex product. The angry memos presented at trial between Moore and the OEM regarding the Sedco job make it clear that the OEM was not on Moore's side of the fence during the Sedco bidding.

The evidence Multiflex has presented to show the existence of conspiracy points to the January, 1978, meeting between Moore and each of the OEMs as the starting date of the conspiracy. Moore officials may have had a conspiracy in mind at the time of the Sedco episode in October of 1977, or earlier, but there is no showing a conspiracy was born until the OEMs joined into conspiracy with Moore in January, 1978. Since the bidding for the lost Sedco job took place before the establishment of the conspiracy, this episode cannot establish a fact

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(footnote continued)

amount of damage resulting from the antitrust violation. By separating the fact of damage determination from the amount of damage computation, an antitrust plaintiff benefits from a "relaxed standard" of showing quantum once the fact of damage is proven. *See generally Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Application of this rather unique damage scenario under the antitrust laws is described also in our discussion of the claimed section 2 violation (parts III, C, and IV, *infra*).

of damage resulting from a section 1 conspiracy claim.[9] Yet this episode is the only one upon which fact of damage was based.

There must be a causal connection between the violation shown and the injury asserted to support a private sector award of money damages. *See In Re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981), *cert. granted*, 456 U.S. 971, 102 S.Ct. 2232, 72 L.Ed.2d 844 (1982); *Gainesville Utilities Dept.* v. *Florida Power & Light Co.*, 573 F.2d 292, 294 n. 3, 304-05 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978). At the time of the Sedco bidding, Moore was acting alone and not pursuant to a contract, combination, or conspiracy. Therefore, Multiflex has not shown adequate "fact of damage" related to the conspiracy claim and cannot recover treble damages under section 4 of the Clayton Act based on its section 1 conspiracy claim.[10] The district court's award of damages under the section 1 theory must be reversed.

III. SECTION 2 CLAIMS

A. The Applicable Law.

Multiflex's other antitrust claim is one of attempted monopolization under section 2 of the Sherman Act, 15 U.S.C. § 2. Monopolization as a legal offense involves more than mere possession of market power. A company can hold a monopoly through one of several legal means, including legislative grant, valid patent rights, or simply through business acumen or a superior product. *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).

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[9] If a conspiracy had been in effect at the time of the Sedco bidding, parties later entering into that conspiracy properly could be charged with knowledge of, hence liability for, earlier acts of the coconspirators. *United States* v. *Davis*, 666 F.2d 195 (5th Cir. 1982). However, no one else was conspiring with Moore to keep Multiflex from the market in October, 1977. One party does not a conspiracy make. *Herman* v. *United States*, 289 F.2d 362, 368 (5th Cir.), *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961). Hence, we cannot allow damages under section 1 for events occurring before the instigation of the conspiracy, namely January, 1978.

[10] We therefore need not rule conclusively on the theoretical question of whether section 1 was violated in the abstract. The evidence, regardless of merit, was not presented by a party deserving of the relief sought.

Monopolization as a legal offense requires that a company engage in overt anticompetitive acts to acquire or maintain monopoly power.

Attempted monopolization under section 2 is usually defined as an unsuccessful attempt to achieve monopolization. *E.g., American Tobacco Co.* v. *United States,* 328 U.S. 781, 785, 66 S.Ct. 1125, 1127, 90 L.Ed. 1575 (1946). The offense requires not a mere or simple risk of monopolization, but a "dangerous probability of success" in the relevant market. *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *H & B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239 (5th Cir. 1978). This dangerous probability can exist event though the attempt ultimately is unsuccessful. Indeed, it is only the failure of the scheme that keeps the charge from becoming actual monopolization.

Attempted monopolization also requires proof of a specific intent to monopolize, unlike the offense of actual monopolization, which is unlawful even without proof of specific intent. *See Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). Finally, the charge demands evidence of overt acts in furtherance of the scheme to monopolize. Claims of attempted monopolization may overlap section 1 claims of restraint of trade, but the charges are not idential: a restraint of trade may be reasonable and therefore not prohibited by section 1, yet still may constitute an attempt to monopolize if a specific intent to monopolize is shown. *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948).

Under an attempted monopolization theory, a defendant is liable for competitive damages if they are caused by the unsuccessful attempt to monopolize. A private sector suit for such damages is subject to the requirements set forth in section 4 of the Clayton Act, 15 U.S.C. § 15, just as is a section 1 claim. To support private recovery, there must be some indication of a particular injury caused to the plaintiff's business or property by the violation.[11] A violation accompanied only by generalized

[11] While this requirement is closely comparable to the "fact of damage" requirement discussed under Section 1, the courts typically do not use "fact of damage" as a phrase of art under section 2.

damage to the marketplace but no particularized injury could support a request for injunction, or could be pursued by government agencies in an enforcement action, but a private suit for damages can be supported only on a showing of particularized economic injury. Multiflex points to the Sedco affair, discussed earlier in this opinion, as the specific episode of its damage.

The claim of attempted monopolization in this case is an unusual one. The evidence shows that Moore enjoyed market dominance in the hydraulic hose bundle market, due in large part to its valid patent covering several stages of the assembly process. Multiflex's charge is that Moore, while holding this lawful market dominance, acted intentionally and overtly to exclude Multiflex and illegally maintain a monopoly. This case, then, is not an attempt to create monopoly power, but an attempt through illegal means to protect a lawful monopoly against rising competitive challenge. Such a claim could constitute the offense of actual monopolization under section 2. It fails as actual monopolization only because Moore's efforts were unsuccessful. Rather than maintaining market dominance, Moore's market share plummeted from over 80% to approximately 38% in just over a year. Multiflex is arguing, in effect, that its own market share would have jumped from almost zero to over 80%, rather than "merely" to the 62% share it achieved in its first two years of operation.

At first sight, it might strain credulity to consider imposing monopolization damages against a firm that rapidly lost, rather than gained, market dominance. The claim is more surprising with the recognition that the plaintiff in this case actually gained in market power during the relevant period. Even an unsuccessful attempt to monopolize, however, can cause substantial injury both in the marketplace and to a competitor. The central issue in this section 2 claim is whether an unsuccessful attempt to maintain monopoly power through anticompetitive acts can support a section 2 claim under any circumstances and, if so, whether the claim is cognizable under section 4 of the Clayton Act in this private suit.

B. Attempted Monopoly and Lack of Success.

Moore urges on appeal that section 2 cannot apply to this case under any circumstances. It points out that its market share dropped from almost complete control of the U.S. market to a 38% share as Multiflex, the company it allegedly was overpowering, grew from nothing to over a 60% share in only two years. With such overwhelming evidence that Moore lost rather than gained any market power it might have had, and that Multiflex prospered rather than suffered during the relevant period, Moore urges that as a matter of law there could be no showing of a "dangerous probability of success." Moore relies heavily on *Nifty Foods Corp.* v. *Great Atlantic & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980), where the Second Circuit ruled that a loss in the defendant frozen waffle maker's market share from 48.3% to 33.0% from 1969 to 1974 could not, as the only evidence presented, support a claim of a dangerous probability of success under a charge of attempted monopolization.

Multiflex, on the other hand, contends that its ultimate success in the marketplace should not preclude us from finding a violation of section 2. Although it might have pulled out of serious ultimate injury from Moore's conduct, it claims that Moore's anticompetitive acts threatened its ability to continue as an ongoing concern when it was a fledgling venture. Its evidence goes beyond shares of the marketplace. It charges that Moore disparaged Multiflex to bankers and prospective customers, so that Multiflex could not obtain the bank financing it needed to remain in business or bid on equal footing for jobs to the OEMs or the end users. Multiflex claims its problems created a "dangerous probability of success" at that time. Only through a substantial infusion of capital from McConkey's brother-in-law and a radical shift from normal industry marketing strategies was Multiflex able to overcome what it characterizes as a willful, unlawful campaign to crush Multiflex at all costs. Multiflex asserts it was damaged by Moore's acts viewed from a short term perspective, even if it ultimately recovered and overwhelmingly prospered in the marketplace.

Characterization of the claims in this case is not an easy matter. We do not conclude, nor have we found a case to

suggest, that a drop in defendant's market share alone can defeat a claim of attempted monopolization. As the Ninth Circuit stated in *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 496 n. 18 (9th Cir.), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1977):

> The record indicates that IBM's market share is declining. A declining market share may reflect an absence of market power, *see United States* v. *International Harvester Co., supra*, 274 U.S. [693,] at 709, 47 S.Ct. 748 [at 754, 71 L.Ed. 1302 (1947)]; *United States* v. *United States Steel Corp.*, 251 U.S. 417, 439 n. 1, 40 S.Ct. 293 [,295 n. 1,] 64 L.Ed. 343 (1920), but it does not foreclose a finding of such power. *See American Tobacco Co.* v. *United States, supra*, 328 U.S. [781,], at 794-95, 66 S.Ct. 1125 [at 1132, 90 L.Ed. 1575 (1946)].

See Lektro-Vend Corp. v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982) and cases cited.

In the *Nifty Foods* case, the Second Circuit dismissed the claims of attempted monopolization when the *only* evidence of antitrust injury was the defendant's drop in market share, which alone, of course cannot possibly establish wrongdoing by a defendant. Further, the decline in market share was a gradual drop continuing over a period of years. This data, the only evidence presented, could not establish the plaintiff's case. We agree, therefore, with the Second Circuit's holding. The Second Circuit the following year in *Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122, 128 (2d Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), made clear that a drop in market share does not defeat an attempted monopolization claim when there is evidence to support the claim. The court said: "We do not doubt the significance of market share evidence as an indicator of either the presence or absence of monopoly. As the cases and commentators have cautioned, however, the true significance of market share data can be determined only after careful analysis of the particular market." *See also Hunt-Wesson Foods, Inc.* v.

Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981) (large and increasing market share, under proper circumstances, could demonstrate market power).

The fact that a plan violative of the spirit of the antitrust laws ultimately fails does not inexorably lead to the conclusion that there was no "dangerous probability of success." As the court said in *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 1982: "[T]he Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense." The time to examine "dangerous probability" is when the acts occur. We do not accept the use of hindsight plus evidence of plaintiff's successful response to the defendant's acts to exonerate an antitrust violator who did cause damage to the plaintiff.

We find adequate evidence to support the jury's implicit finding that there was a "dangerous probability of success," when we look at the situation at the time of the violation. Viewing this appeal of a jury verdict in the manner most favorable to the verdict, we can state that Samuel Moore & Co. memos showed a clear intent to freeze Multiflex out of the market. We note that Moore told Multiflex's bankers and competitors that Multiflex's products were inferior, that the company was closing down, and that the plant had been shut in anticipation of bankruptcy with Pinkerton security guards posted at the door. Viewing the danger from the proper time perspective, we can find a sufficiently dangerous probability that Moore would have maintained its monopoly power through illegal means and would have frozen Multiflex out of the market. Multiflex amply demonstrated Moore's "overt acts" in furtherance of the attempt to monopolize, and showed anticompetitive behavior from which a specific intent to monopolize can be inferred. The fact that Multiflex was able to overcome the hurdles Moore erected and established a strong market presence should not allow Moore to escape liability, although market success could be expected to affect the quantum of a damage award. We find that Moore's market position

in 1977 plus its overt anticompetitive acts indicate a specific intent to monopolize and created a dangerous probability that Moore would injure both Multiflex and the open, public market place in violation of section 2.[12] This dangerous probability did not materialize because of the quality of Multiflex's product and the dedicated and imaginative way the company built a market for it.

Finding each of the necessary elements to support the jury's verdict, we affirm the district court's holding of a section 2 violation.

C. Antitrust Violation as the Cause of Damage.

Finding the likelihood of attempted monopolization does not end our analysis, however. Since this is a private sector suit for money damages, the plaintiff must also satisfy the requirements of section 4 of the Clayton Act. This means Multiflex must show by a preponderance of the evidence some actual damage to its own business or property that was proximately caused by the antitrust violation.

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[12] Claims of attempted monopolization under Section 2 must be presented within the confines of a well-defined product market. *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976). The definition must set forth both the products in question and the geographic limits of the relevant market. The jury found the relevant market to be hydraulic hose bundles in the United States. It excluded sales of hard metal pipe or other products that might, under certain limited circumstances, substitute for hydraulic hose bundles. Similarly, the jury excluded the United Kingdom market and other foreign markets for offshore drilling equipment.

Moore argues on appeal that the relevant market should be the worldwide market for BOP devices. Under this definition, the jury would have had to consider markets such as the United Kingdom, where other manufacturers hold significant market share and where Moore's sales are minimal, in assessing liability. A worldwide definition of the relevant market would make it more difficult for a jury to find that Moore possessed market power.

The record supports the view that hydraulic hose bundles have no practical substitute in the BOP market, and that the demands of the market and of foreign governments in overseas markets makes the United States market a reasonable definition of "relevant market" or "relevant submarket" for the purpose of this case. We therefore find no error in the jury determination of relevant market.

Although Multiflex in this case ended up the victor in this competitive war, this fact does not foreclose interim damages even though this victim of attempted monopolization ultimately benefitted from the monopolistic conduct. The attempt at monopolization could well have hindered or delayed the natural growth of the victim's market share. A competitor's lawful and successful response to otherwise illegal monopolization activities does not negate the possibility of short term damage. The plaintiff, of course, carries the burden of showing damage.

Multiflex relies on the lost Sedco job, discussed earlier in connection with the section 1 claim, as proof of section 2 damage. We find that this evidence is sufficient to establish injury for purposes of section 4 of the Clayton Act. There is substantial evidence to indicate that Moore mounted a vicious attack against Multiflex during the early days of Multiflex's existence, and that it was prepared to do "whatever it takes" to remain "number one" in the business. The Sedco affair failed as "fact of damage" under section 1 because Moore had not yet induced the OEMs to join in the conspiracy. The attempted monopolization by Moore, by contrast, did not require concerted action. Accepting the jury's verdict as revealing a belief that Multiflex would have earned the Sedco job in the absence of Moore's misconduct, we hold that Multiflex has met its burden of showing injury stemming from the section 2 violation.

To complete the burden necessary to recover under section 4, Multiflex need only show that its injury was proximately caused by the antitrust violation and a showing of the actual dollar amount of the damage. Multiflex must first establish a link between its damages and the values the antitrust laws were designed to remedy. Antitrust plaintiffs

> must prove more than injury casually linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original). The question that must be addressed is whether Multiflex's proven specific instance of damage is related to the section 2 violation.[13]

Moore argues that there can be no private damage award in this case under any circumstances, since Multiflex's market share increased so dramatically in so short a time. It believes that even if it were to concede anticompetitive acts, Multiflex's success in the market negates the requisite connection between conduct and injury, and conclusively offsets any possible recovery. We cannot accept such a sweeping argument. Moore should not be entitled to use Multiflex's successes to offset actual damage resulting from its own anticompetitive behavior. If Multiflex can prove that its injury was proximately caused by Moore's antitrust violation, we must allow recovery without offsetting this amount by the beneficial effects of Multiflex's strategic ingenuity.

Yet we cannot allow treble damages under the Clayton Act unless the injury was the type the antitrust laws were designed to protect. In this respect, charges of attempted monopolization differ from claims of actual monopolization. In the case of actual monopolization, there can be little doubt that the violation injures the marketplace and violates the public policies that the antitrust laws seek to protect. This helps explain, in part, why actual monopolization is an offense even without a showing of specific intent.

Attempted monopolization, on the other hand, does not invariably lead to the type of injury the antitrust laws seek to

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[13] Professor Areeda described the connection between public injury and private recovery in Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127, 1127 (1976).

> Money awards under the antitrust laws do not serve only to compensate injured plaintiffs. Treble damages also punish wrongdoers and enlist private plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing. But the desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are non-existent, inconsistent with antitrust policy, or unconnected with the true rationale for imposing antitrust liability. (Citation omitted.)

prevent. The attempt may fail to produce any actual antitrust injury to the marketplace. In this case, for example, the threatened injury to free and open competition never materialized except at most for a brief period. The market quickly beat a path to Multiflex's door in search of the fabled better mousetrap. The "dangerous probability of success" never progressed to success.

The seeming conflict is actually illusory, however. The offense of attempted monopolization need not cause actual market damage, but need merely threaten to produce the type of market damage contemplated in the antitrust laws. The relevant test is whether the "dangerous probability of success," *if it had materialized*, would have caused the type of market damage the antitrust laws seek to prevent. The mere attempt is the offense. *LektroVend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982).

Under such an inquiry, we have little trouble finding the necessary link between Multiflex's injury and the public policies behind the antitrust laws. Moore clearly was trying to maintain its market dominance and exclude any and all competitors. It stepped far beyond the bounds of reasonable competitive practices in trying to maintain its market position.[14] The jury implicity found that Moore had a specific intent to monopolize the market, a determination we find supported by substantial evidence. The Sedco incident is an example of the kind of sale Multiflex wanted to gain but that Moore was determined to win at all costs. Within the relevant market, Moore and Multiflex were the only substantial suppliers. It is therefore almost tautological to find that Moore's intent plus actions with an eye toward monopolization would injure Multiflex, its chief and

[14] The testimony in the record suggests a long list of Moore's anticompetitive practices. In addition to the allegation discussed earlier that Moore told customers Multiflex was insolvent and had Pinkerton guards posted at its gates, there is also evidence that detecting, disparaged the quality of the Multiflex product, overstated the pressure ratings of its own competing products, and advised potential investors that the company had no customers. Multiflex has dropped its earlier claim that the patent infringement claims that began this litigation were themselves part of an anticompetitive scheme to retain market dominance.

perhaps only, competitor. Furthermore, it seems clear that these actions interfered with the ultimate customers' free choice in the marketplace and forced them into the position of following the well-trodden path to Moore's doorstep or hewing a treacherous, uphill path to Moore's only competitor. This is the stuff of which antitrust cases are made.

Armed with the findings of overt acts, injury, and proximate relation to the intent of the statutes, we affirm Multiflex's right to recover under section 4 of the Clayton Act for Moore's attempt to monopolize in violation of section 2 of the Sherman Act. The final issue in this case is the proper quantum of damages.

IV. QUANTUM OF DAMAGE

We have concluded that Multiflex may recover on its section 2 claims and not on its section 1 claims. Normally this would lead us to uphold the section 2 award made in a district court and nullify the section 1 award. The appellate court's power to review jury damage awards is narrowly limited. *Terry* v. *Raymond Int'l, Inc.*, 658 F.2d 398, 404 (5th Cir. 1981), *cert. denied*, 456 U.S. 928, 102 S.Ct. 1975, 72 L.Ed.2d 443 (1982); *Kramer v. Keys*, 643 F.2d 382, 386 (5th Cir. 1981). However, we cannot uphold the jury's section 2 award in this case and must instead remand for a redetermination of section 2 damages.

A. The Applicable Law.

Even after showing the "fact of damage" sufficient to establish liability under section 4 of the Clayton Act, Multiflex held the burden at trial of showing a rational quantum of actual damages stemming from the antitrust violations. This showing of the "amount of damage" enjoys a relaxed burden of proof as compared to the initial "fact of damage" proof requisite to establishing liability for damages under section 4 of the Clayton Act. The burden is relaxed, in part, because once a plaintiff has shown injury through anticompetitive behavior, we do not require that plaintiff prove with exact particularity what its success might have been in the market in the absence of the illegal conduct of another. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 1929, 68 L.Ed.2d

442 (1981), *after remand*, 670 F.2d 575 (5th Cir. 1982), *cert. denied*, ____U.S.____, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982); *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 983 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972). However, even under a relaxed burden of proof, there must be a rational basis by which a jury can assess the amount of antitrust damages or the award cannot stand. *Chrysler Credit Corp.*, v. *J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.), *cert. denied*, ____U.S. ____, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982), *Household Goods Carriers' Bureau* v. *Terrell*, 452 F.2d 152, 159 (5th Cir. 1971) (en banc), *appeal after remand*, 494 F.2d 16 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). We examine two aspects of the award in this case: the damage model upon which the award was based, and the relationship between the verdict and the evidence.

B. The Damage Model.

In its pleadings, Multiflex asked for approximately $550,000.00 in damages growing out of both section 1 and section 2 antitrust claims, before trebling or attorney's fees. It based this amount on a model of lost profits developed for its use by an economic consultant. The damage model was the expert's attempt to indicate what the market shares for Moore and Multiflex would have been in the absence of anticompetitive acts. It looked to the few sales made directly to end users during that period, where the expert assumed little, if any, market interference had taken place. He found that Multiflex had just over 80% of that submarket. The economist used this figure as a "yardstick" to project an 80% market share over

Multiflex's entire market. The economist's model in short, assumed that Multiflex's market share should have been just over 80% for the entire period in question, rather than the actual rise from zero to 63% over two years. The difference between the actual market share and the 80%+ theoretical market share established the basis of the expert's damage model. Typical profit margins in each submarket then produced the expert's final damage figure, based on his "yardstick" model.

At trial, the expert's damage model was attacked on many grounds. First, Moore attempted to show that the model was based on lost gross profits, rather than on the proper measure of lost net profits. *See Deaktor* v. *Fox Grocery Co.*, 475 F.2d 1112, 1116-17 (3d Cir.), *cert. denied*, 414 U.S. 867, 94 S.Ct. 65, 38 L.Ed.2d 86 (1973). The expert agreed at trial with Moore's charge that his estimates of lost profits did not account for increases in marginal production costs, as a net profit model should. This made his model more analogous to an impermissible accounting of gross profits. However, the expert expressed his opinion that marginal costs of production in this case were so small as to be irrelevant, since the majority of the costs of production were fixed rather than incremental, and Multiflex was operating below its production capacity at the time in question. He showed uncontroverted evidence that the marginal labor and electricity costs for the lost production were minimal and that to include these costs in the model would have had little effect on the damages claim. Moore presented no countering evidence at all that the marginal costs of production would be any different than the expert's estimates. In any event, the jury was entitled to weigh and evaluate the expert's opinion. We find no error in the jury accepting the expert's cost estimates.

Similarly, the expert adjusted the damage estimates to create a net present value for the previous injury. Expressing a past damage figure in present terms required an estimation of the lost opportunity cost of the capital. The estimate normally equals the interest that might have been earned on the funds if placed in alternative investments. The expert in this case developed a discount figure based on the yield available on

three-month Treasury bills on the dates in question to project the 1977-79 damages into terms of present value. Moore claims that these projections amount to nothing more than prejudgment interest, which normally would not be recoverable in this antitrust action. *See Volkswagenwerk*, 553 F.2d at 986 & n. 20. *Cf.* 15 U.S.C. § 15 (Supp. V, 1981) (prejudgment interest allowable under certain circumstances for actions commenced after September 12, 1980).

However, this Court in *Volkswagenwerk* condemned prejudgment inflation of damage claims only when the adjustments amount to nothing more than bare interest. In *Volkswagenwerk*, for example, we affirmed a net present value adjustment to a claimed loss in capital. Ruling that the adjustment was for the lost opportunity cost from the capital formation rather than a bare claim to prejudgment interest, we affirmed that portion of the award. Similarly in the present case, we find that the claims were made to reflect what the asserted lost profits would have earned in an open investment market, not as a statutory claim for prejudgment interest. Since the claim was based on an economic theory and not in a claim to statutory or common law prejudgment interest, we find no error in this portion of the award.

Moore also contests the method by which the damage model classified sales in the relevant market and time frame as foreign or domestic. The model developed by Multiflex's expert looked to the domestic or foreign location of the buyer's purchasing agent, rather than to the location of actual installation. Moore argues that a sale to an American company for installation abroad should not enter into the damage award that is concerned only with the U.S. market. The relevant market, however, is defined as sales in the U.S. market. A sale is made when a contract is formed. A contract is formed when a bid is accepted. *See* 1 A. Corbin, Corbin on Contracts §§ 55-56 (1963 ed.) We find it logical to assume that the contract bids were accepted by the buyers at their mailing addresses rather than at the location of their drilling sites. Under this view, contracts formed in the U.S. are part of the U.S. market, and those established elsewhere are not. We find no error in this aspect of the expert's analysis.

C. Support in the Evidence.

The damage model, although reasonable in other respects, does contain a fatal flaw as applied to the jury's verdict. The damages claimed were not split into components of section 1 and section 2 damage. Rather, the model projected only one total figure for the Sherman Act damages alleged under both section 1 and section 2 theories. There is no clear error in such calculations—section 1 and 2 theories often overlap in a case, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788, 66 S.Ct. 1125, 1128, 90 L.Ed. 1575 (1946), and similar facts may not only establish both violations but may result in similar or identical injury. However, the plaintiff's failure to distinguish between its section 1 and 2 injuries is relevant in this case because the jury split its verdict into an award for the section 2 damage, which we recognize, and the section 1 damage, which we reverse. Since the legal underpinnings of the jury's award do not both survive this appellate review, we must remand for retrial of the quantum of damages, based on the factors explained below.

The reason we must reverse the jury's award of section 2 damages is that there is no rational basis in the record for distinguishing between the section 1 and section 2 damage award. Nowhere in the record does either party suggest what damages might be appropriate if one theory and not the other were valid in this case.[15] The jury's bifurcation of the award

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[15] In Multiflex's single reference to the breakdown of the damage claim, made during closing argument, its attorney told the jury:

Finally, I want to talk to you a minute about one area that may be a slight problem for you on the question of damages.

Necessarily, you are going to have to look at the question on how much damages was caused by the conspiracy, how much damages was caused by the attempt to monopolize.

Of course, Multiflex lost their sales as a result of not being able to sell through the three OEM's. This was kind of a mixture of things that happened.

So, you, as the jury, are in the position of having to use your discretion in how to answer those two damage questions.

Certainly Multiflex is not claiming any more than that as their total damages in this case.

Record on Appeal, Vol. 14, at 48.

into $382,963.07 for section 1 damages and $205,964.73 for section 2 is completely unsupported in the evidence and does not represent the "substantial, credible evidence" that is a prerequisite for our upholding a jury verdict. *Gunning* v. *Cooley*, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720 (1930); *Coughlin* v. *Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978); *Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). Since we are reversing the section 1 component that served as partial support for the jury's award, we must nullify the jury's damage verdict and remand for a new trial on the damages growing out of the section 2 violation alone.

Moore raises an additional point for us to consider in examining the jury's damage award. After the jury returned its verdict, the district judge obtained the affidavits of the jury foreman and another juror. These apparently were taken because the total award was greater than the plaintiff's proof at trial. These affidavits suggest that the jury verdict might have included $200,000 to compensate Multiflex for "injury to its reputation" or to "punish" Moore for its conduct. One juror also stated that the $200,000 figure was reached by taking an average of each juror's predilection regarding such an award—a "quotient verdict." Neither theory is a proper basis for recovery in a Sherman Act claim, and Moore now asks us to overturn the jury award on the basis of jury misconduct.

Punitive damages are impermissible in an antitrust award. The treble damage provisions accomplish, in part, a similar purpose. However, we are also cognizant of the need to respect the finality of a jury verdict. In general, it is unwise to leave open to doubt the propriety or finality of a jury's decision if there is any credible basis for supporting its verdict. Rule 606(b) of the Federal Rules of Evidence discusses the limited premissible inquiry into the validity of a verdict. An affidavit discussing the jury's decision-making process is cognizable only to discover whether "extreneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed.R.Evid. 606(b). The court, therefore, properly could not consider Moore's charges that the jury awarded impermissible punitive damages or arrived at a "quotient

verdict." *Wilkerson* v. *Amco Corp.*, 703 F.2d 184 (5th Cir. 1983); *O'Rear* v. *Fruehauf Corp.*, 554 F.2d 1304 (5th Cir. 1977).[16]

The district judge in this case examined the affidavits for the single purpose of determining whether the award was supported in the evidence. He found that the award was larger than the damages shown at trial, at which point he properly offered Moore the option of remittitur in the amount of the unsupportable excess. *Carlton* v. *H.C. Price Co.*, 640 F.2d 573, 582 & n. 14 (5th Cir. 1981); *Geyer* v. *Vargas Productions, Inc.*, 627 F.2d 732, 735 (5th Cir. 1980); *Bonura* v. *Sea Land Service, Inc.*, 505 F.2d 665, 669-70 (5th Cir. 1974). The remittitur, accepted by the plaintiff Multiflex, properly reduced the award only to the extent necessary to conform to the evidence. *See Gorsailtz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1046 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir. 1972), *cert. denied*, 407 U.S. 921, 92 S.Ct. 2463, 32 L.Ed.2d 807 (1972). The district court properly handled the questions raised by the excessive amount of the verdict. Therefore, we refuse to consider Moore's arguments regarding the foundation of the verdict. However, as discussed earlier, we find the verdict unsupportable in its breakdown of damages into the section 1 and section 2 components. We still must remand, therefore, for readjudication of the damage award.

Since the jury was never instructed on the delineation between the section 1 damage and the section 2 damage when it rendered its verdict, we cannot allow the section 2 damage award to stand. It is clear that the jury intended to compensate Multiflex for the profits it lost in the years 1977, 1978, and 1979 when it was fighting its uphill battle against Moore for its rightful market share. Yet, it would be pure speculation to

[16] The draft of Fed.R.Evid. 606(b) as passed by the House of Representatives would have permitted juror testimony about objective matters occurring during the jury's deliberation, such as the reaching of a quotient verdict, *see* H.Rep. 93-650, U.S.Code Cong. & Admin.News 1974 p. 7051, but the version passed by the Senate, *see* S.Rep. No. 93-1277, and approved by the Joint Conference Committee expressly denounces such a practice, H.Rep. 93-1597. This makes clear the drafters' intent that a jury's verdict should not be open to searching the minds and motives of the jurors, and must be affirmed if there is adequate support for the award.

calculate what the jury might have awarded if presented only with the meritorious section 2 theory.

In remanding for calculation of quantum, however, we caution the district court to observe the distinction between the fact of damage growing out of the Sedco incident, which already has been determined by a preponderance of the evidence, and the amount of damage which must be calculated on remand on the basis of credible evidence presented to the jury. Since the fact of damage already has been shown with a reasonable certainty, the damages claimed on remand may be shown with a somewhat relaxed standard in this bifurcated procedure. *See MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983); *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 317-19 (5th Cir. 1978); *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 21 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

V. CONCLUSION

In summary, we reverse the jury's finding of a conspiracy in restraint of trade, violative of section 1 of the Sherman Act, 15 U.S.C. § 1; we affirm the finding of attempted monopolization, 15 U.S.C. § 2. We reverse and remand for a new trial on the issue of damages growing out of the Section 2 violation, in accordance with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED.

APPENDIX B

CIRCUIT COURT NOTICE DENYING PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 81-2405

MULTIFLEX, INC.
Plaintiff-Appellee,

v.

SAMUEL MOORE & COMPANY, AND
EATON CORPORATION,
Defendant-Appellants.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

On Petitions for Rehearing and Suggestion for Rehearing En Banc

(Opinion 7/22/83, 5 Cir., 198_, ____F.2d____)

(September 14, 1983)

Before WILLIAMS and JOLLY, Circuit Judges and WILL*, District Judge.

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* District Judge of the Northern District of Illinois, sitting by designation.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

.....

United States Circuit Judge

REHG-7

APPENDIX C
DISTRICT COURT JUDGMENT

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-78-535

MULTIFLEX, INC.,
Plaintiff,

vs.

SAMUEL MOORE & COMPANY, AND
EATON CORPORATION,
Defendants.

FINAL JUDGMENT

This cause came on for trial before the Honorable Woodrow Seals, District Judge, and a Jury on August 6, 1981, and continued through August 31, 1981, both parties appearing by counsel, and the Court having submitted special interrogatories to the Jury and the Jury having answered as follows:

SPECIAL INTERROGATORY NO. 1

During the time period in dispute in this case, do you find from a preponderance of the evidence that there existed a relevant product market or submarket consisting of only hydraulic hose bundles as alleged by Multiflex?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 2

During the time period in dispute in this case, do you find from a preponderance of the evidence that there existed a relevant geographic market or submarket consisting of only sales within the United States as alleged by Multiflex?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that Samuel Moore entered into a contract, combination or conspiracy with one or more control equipment manufacturers pursuant to which such control equipment manufacturers refused to purchase hydraulic hose bundles from the plaintiff Multiflex?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 4

If you have answered Special Interrogatory No. 3 "We do," then answer Special Interrogatory No. 4. Otherwise do not answer Special Interrogatory No. 4.

Which one or more of the control equipment manufacturers do you find from a preponderance of the evidence was engaged with Samuel Moore in a contract, combination or conspiracy as alleged by Plaintiff?

Answer by writing in names of manufacturer(s).

ANSWER: Stewart & Stevenson Oiltools
Cameron Iron Works
Valcon, Inc.

FURTHER INSTRUCTIONS: The companies alleged by Multiflex to have engaged in a contract, combination or conspiracy are: Stewart and Stevenson Oiltools, Inc. (and its successor NL Industries); Cameron Iron Works; and Valcon, Inc. The Court is not suggesting by naming those companies that you should write any one or all of those names in answer to Interrogatory No. 4, but it is merely to have the correct technical names before you in your deliberations.

SPECIAL INTERROGATORY NO. 5

If you have answered Special Interrogatory No. 3 "We do," then answer Special Interrogatory No. 5. Otherwise do not answer Special Interrogatory No. 5.

Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, constituted an unreasonable restraint of trade by adversely affecting competition in interstate commerce in the relevant market?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 6

If you have answered Special Interrogatory No. 5 "We do," then answer Special Interrogatory No. 6. Otherwise do not answer Special Interrogatory No. 6.

Do you find from a preponderance of the evidence that Plaintiff suffered injury to its business or property by reason of such contract, combination or conspiracy?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 7

If you have answered Special Interrogatory No. 6 "We do," then answer Special Interrogatory No. 7. Otherwise do not answer Special Interrogatory No. 7.

Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, was a direct and proximate cause of any injury to Plaintiff?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 8

If you have answered Special Interrogatory No. 7 "We do," then answer Special Interrogatory No. 8. Otherwise do not answer Special Interrogatory No. 8.

What amount of damages, if any, do you find from a preponderance of the evidence that Plaintiff is entitled to recover for losses proximately resulting from any such contract, combination or conspiracy?

Answer in dollars and cents, if any.

ANSWER: $382,963.07*

SPECIAL INTERROGATORY NO. 9

Do you find from a preponderance of the evidence that Samuel Moore specifically intended to monopolize any relevant market you have found to exist?

Answer "We do" or "We do not".

ANSWER: We do.

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* Based on Interrogatory No. 1, air tube bundle damages are excluded.

SPECIAL INTERROGATORY NO. 10

If you have answered Special Interrogatory No. 9 "We do," then answer Special Interrogatory No. 10. Otherwise do not answer Special Interrogatory No. 10.

Do you find from a preponderance of the evidence that Samuel Moore committed some act or acts in furtherance of its specific intent to monopolize which resulted in a dangerous probability that monopolization in the relevant market would sooner or later occur?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 11

If you have answered Special Interrogatory No. 10 "We do," then answer Special Interrogatory No. 11. Otherwise do not answer Special Interrogatory No. 11.

Do you find from a preponderance of the evidence that Plaintiff suffered any injury to its business or property by reason of any alleged acts of Samuel Moore undertaken in furtherance of any specific intent to monopolize the relevant market?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 12

If you have answered Special Interrogatory No. 11 "We do," then answer Special Interrogatory No. 12. Otherwise do not answer Special Interrogatory No. 12.

Do you find from a preponderance of the evidence that any alleged acts committed by Samuel Moore with the specific

intent to monopolize the relevant market were a direct and proximate cause of any injury to Plaintiff?

Answer "We do" or "We do not".

ANSWER: We do.

SPECIAL INTERROGATORY NO. 13

If you have answered Special Interrogatory No. 12 "We do," then answer Special Interrogatory No. 13. Otherwise do not answer Special Interrogatory No. 13.

What amount of damages, if any, do you find from a preponderance of the evidence that Plaintiff is entitled to recover for losses proximately resulting from any such alleged acts committed by Samuel Moore with the specific intent to monopolize the relevant market?

Answer in dollars and cents.

ANSWER: $205,964.73.

The Jury having rendered a special verdict in favor of the Plaintiff and against the Defendants in the sum of $588,927.80, before trebling, and Plaintiff having filed with the Clerk of the Court a written consent to reduce the verdict to $549,362.98, before trebling, and said consent having been duly signed, acknowledged and filed with said clerk,

It is hereby FINALLY ORDERED, ADJUDGED and DECREED that the foregoing special verdict of the Jury, including specifically each and every Special Interrogatory and the Jury answers thereto are adopted by the Court and are incorporated in this judgment,

Based upon such Jury verdict, the Court concludes that Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, have been violated by Defendants, and each of them,

and further, Plaintiff Multiflex, Inc., shall recover of the Defendant Samuel Moore & Company and the Eaton Corporation the sum of $1,648,088.94 with interest thereon from the date of the entry of this Judgment at the rate of nine percent as provided by law.

Costs under 28 U.S.C. § 1920 are also hereby awarded to Plaintiff, and the award of the attorney fees under 15 U.S.C. § 15 shall be determined by a separate hearing before this Court upon final disposition of an appeal, if any, from this judgment, or if no appeal is taken, upon the expiration of the time for appeal from this judgment.

Dated at Houston, Texas, this 4th day of September, 1981.

.....

HON. WOODROW SEALS
U.S. District Court Judge

FILED
JAN 12 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-978

In The
Supreme Court of the United States
October Term, 1983

SAMUEL MOORE AND COMPANY and
EATON CORPORATION,

Petitioners,

vs.

MULTIFLEX, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question stated by the Petitioners is not truly presented by this record because:

1. All elements of an attempt to monopolize were made out by the evidence.
2. There was a jury verdict finding a dangerous probability of monopolization.
3. The evidence showed severe barriers to entry in the market, and the jury was properly instructed to consider market power and barriers to entry.

TABLE OF CONTENTS

	Page
Counterstatement of the Case	1
Reasons for Denying the Writ	9
I. The Evidence Established That Moore Was A Monopolist, Had A Specific Intent To Monopolize, And Its Overt Acts Created A Dangerous Probability That It Would Succeed In Destroying Multiflex, Its Only Potential Competitor, And Thus Retain Its Monopoly In The Relevant Market	11
II. For Petitioners To Say There Were No Barriers To Entry Is To Ignore The Facts Before The Jury And The Court Below	14
III. This Is Not A Case In Which To Review The Ninth Circuit Cases Dealing With The Dangerous Probability Of Monopolization Under Section 2 Of The Sherman Act	22
IV. Conclusion	25

TABLE OF AUTHORITIES

Cases

American Tobacco Co. v. United States, 328 U.S. 781 (1946)	14
Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122 (2d Cir. 1981), cert. denied, 454 U.S. 968 (1981)	14
Greyhound Computer Corp. v. International Business Machines Corp., 559 F.2d 488 (9th Cir.), 434 U.S. 1040 (1977)	14, 22
William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1982), cert. denied 103 S.Ct. 57, 58 (1982)	22
Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981), cert. denied, 455 U.S. 921, (1982)	14

TABLE OF AUTHORITIES—Continued

Page

Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832 (2d Cir. 1980) 14

Twin City Sportservice Inc. v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir.), cert. denied, 103 S.Ct. 364 (1982) 22

United States v. United Shoe Machinery Corp., 110 F.Supp. 295 (D. Mass. 1953), aff'd. per curiam, 347 U.S. 521 (1954) 20

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 24

TREATISES

P. Areeda & D. Turner, Antitrust Law (1978) 17

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COUNTERSTATEMENT OF THE CASE

This case involves a virtual 100% monopolist. After a six week trial, the jury found Petitioners (hereinafter "Moore") had conspired with three other companies, had the specific intent to monopolize the relevant market, and had committed some act or acts in furtherance of its spe-

cific intent to monopolize which resulted in a dangerous probability of monopolization in the relevant market.[1]

The Court of Appeals for the Fifth Circuit reviewed the facts and agreed that under the factual situation presented, even though there was a substantial decrease in the percentage of the business of Petitioner over a two year span from 1977-1979, there was substantial evidence of a dangerous probability of monopolization by Moore in 1978. Although the factual situation may be "unique" because Respondent was able to survive and increase its percentage of total market *after the time* when the dangerous probability of monopolization by Petitioner occurred, the barriers to entry, the anticompetitive intent, the overt acts of Moore to destroy Multiflex, and its monopoly position when Respondent entered the market all establish conclusively the "attempt to monopolize" under Section 2 of the Sherman Act.

When Respondent[2] (hereinafter "Multiflex") first attempted to enter the relevant market of hose bundles in 1977, Moore was the only company manufacturing hydraulic hose bundles in the United States.[3] Although Moore only admitted to "at least an 80-85% market share", there were no other competitors in the relevant market, and Moore thus had a virtual 100% stranglehold on the market until 1978. 709 F. 2d at 984 (Footnote 4); App. A at p. 3a. Further, the evidence established that American Hose

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[1] See Jury Interrogatories 3, 4, 9, and 10; App. 2c, 4c and 5c.

[2] Under Rule 28.1, Multiflex U.K., Inc. and Multiflex Offshore Services, Ltd., are subsidiaries, and M.F.X. do Brazil Ltda. is an affiliate.

[3] Moore had been in that business since 1962.

and Reel, although it had attempted to get into the hose bundle business as a competitor of Moore several years before 1977, was already out of business by 1977. Although Moore denigrates its patent position now, this litigation was initiated by Moore bringing a patent infringement suit against Multiflex. The prior unsuccessful entrant, American Hose & Reel, likewise was sued for infringement of the same patent by Moore before it went out of business.

Another company, Vector Cable Co., a Schlumberger subsidiary, made some hose bundles prior to 1974 for a sister subsidiary of Schlumberger and then in 1977 considered getting into the business of making hose bundles but decided not to even try to enter the market after a study of the market. Although there was evidence that several U.K. manufacturers made hydraulic hose bundles, there was no evidence that any sales were made in the United States except where the bundles were for use in the U.K. under the "Buy U.K." policy of the British government.[4]

The evidence further established that in 1977 there were only three companies[5] in the U. S. in the business of buying hose bundles and reselling them with their own equipment on a turnkey basis, all of whom were located in Houston. The substantial monopoly position of Moore

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[4] Although Moore only admitted to having at least 80%-85% of the relevant market in 1977, there was ample evidence unrefuted by Moore that there was in fact no competition in the relevant market, and Moore was indeed a true 100% monopolist when Multiflex entered the market.

[5] Herein and in the Petition, the three companies are called "OEMs" because they were original equipment manufacturers of oilfield equipment with which the hose bundles were used.

with respect to sales of BOP hose bundles to the three OEMs thus resulted in Moore having a monopoly in the sale of hose bundles to the entire relevant market.

The arrangement which Samuel Moore had with the three OEMS goes back a number of years prior to 1977 and included a price multiplier which was used to discourage end users from buying directly from Samuel Moore (PX-14). This exclusionary barrier worked in the following way: Samuel Moore agreed with the three OEMs that if a request came to Moore from an end user for a price on a bundle, Moore would quote the end user by applying a "price multiplier" which it would multiply by the price Moore quoted for the same bundle to the OEM (PX-14). Since the OEM knew the price multiplier, the OEM therefore knew in each instance the quotation which was made directly from Samuel Moore to the end user. Accordingly, the OEMs would quote a price based on the multiplier, so that there was no price reason for the end user to purchase from Samuel Moore. Therefore, by design, the established channel for the purchase of hose bundles by the ultimate consumer when Multiflex entered the market in 1977 was through the three OEMs.

It was that established channel of marketing which Multiflex attempted to enter as a manufacturer in mid-1977 and in which it encountered its first exclusionary activity on the part of Moore.

The exclusionary activity included a conspiracy between Moore and the three OEMs to exclude Multiflex. The goal of the conspiracy was to eliminate the only potential competitor of Moore in the relevant market. 709 F. 2d at 988; App. A at p. 11a. Although an antitrust

conspiracy is rarely shown by direct evidence, Multiflex was able to produce Moore's own "smoking guns" with the result that there was ample evidence of a conspiracy to restrain trade. 709 F. 2d at 988; App. A at p. 10a. The jury likewise found that there was a conspiracy. App. C at p. 2c.

In addition to the conspiracy, the jury found Moore had a specific intent to monopolize the relevant market. Jury Interrogatory No. 9; App. C at p. 4c. The Fifth Circuit agreed. 709 F. 2d at 992; App. A at p. 18a, 19a. The evidence which supported the specific intent was a part of the "smoking guns" referred to by the Fifth Circuit in its opinion. For example, in a memo by Moore's national sales manager for hose bundles written in October, 1977 (PX-53), he wrote " . . . do we want to sit down with [the three OEMs] and see what we can all do to keep these other guys out of it?" Another memo by the dominant one of the three OEMs, written in October, 1977 (PX-14) when Multiflex was first trying to break the barriers of entry into the market, made the following telling statement:

> "We pointed out to Samuel Moore that they would have to accept the fact that someday, someone would offer them competition in the manufacturing of hose bundles. After much more discussion, in summary, we were told by Samuel Moore that they would do whatever was necessary to prevent Multiflex from entering into the hose business."

In January of 1978 after a meeting between Moore and all three OEMs, according to a Moore memo (PX-54), they all agreed that the day of the 1.7, 1.8 markup was gone and they hoped the days of high profit margins

would return, "but for the most part it is a war situation now." 790 F. 2d 987, 988; App. A at p. 9a.

As the Fifth Circuit observed in Footnote 14:

> "The testimony in the record suggests a long list of Moore's anticompetitive practices. In addition to the allegation earlier that Moore told customers Multiflex was insolvent and had Pinkerton guards posted at its gates, there is also evidence that detecting,[6] disparaged the quality of the Multiflex product, overstated the pressure ratings of its own competing products, and advised potential investors that the company had no customers." F. 2d 994, App. A at p. 22a.[7]

On March 7, 1978, the President of Moore wrote to the Executive Vice-President of the major OEM (PX-44), which OEM had 90% of the OEM business, and stated:

> " . . . [W]e are both anxious to do what we can to stop Multiflex from getting a foothold."

Then, on March 22, 1978, Moore brought a patent infringement suit against Multiflex, just one month before the big Offshore Technology Conference in Houston which is attended by most of the offshore users of hose bundles.

Henry Massey, Senior Vice-President-Lending Officer, for Republic Bank, Spring Branch, Texas, testified

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[6] Moore had an informant who was an inside employee in Multiflex who went by the code name, "Deep Throat". (PX-87) This contact informed Moore of Multiflex's business, and enabled Moore to know Multiflex's bids to customers.

[7] The text of Footnote 14 differs slightly in the Appendix to Moore's Petition as compared to the reported version at 709 F.2d at 994.

that his bank made an initial loan to McConkey in July, 1977 of approximately $350,000.00 to finance working capital for start-up expenses and for the down payment on the building at Magnolia, Texas. Massey learned from McConkey early in 1978 that "the traditional methods of marketing the flexible hoses was closed to [Multiflex]", and further that the patent infringement suit had been filed by Samuel Moore against Multiflex. He began to visit Multiflex every other week in mid-1978 to assess the approach the bank needed, such as whether to liquidate the loan, and force the company into bankruptcy. He was concerned about the adverse publicity of the lawsuit on the Dun and Bradstreet reports and the lack of sales by Multiflex of hose bundles through mid-1978. In mid-1978 McConkey attempted to get further loans from the Spring Branch bank for Multiflex, but after looking at the updated financial statements, Massey refused to grant any more loans. McConkey testified that he made efforts to get loans from other banks, including First City National Bank, Commerce Bank, Allied Bank and two different small business investment corporations. Multiflex was in such desperate straits in mid-1978 that McConkey attempted to negotiate the sale of his home to put the equity into the corporation, and he negotiated with Gates Rubber Company to extend further credit. John Yeager, McConkey's brother-in-law, decided in May of 1978 that it was necessary to make a loan from his personal sources of $200,000.00. He did this because they were a close family and he felt he could help McConkey in his desperate financial difficulties brought about by the patent infringement suit and Multiflex's exclusion from any sales to the three OEMs. The situation was so difficult for Multiflex that in the latter part of 1978 Yeager

helped McConkey work out a deal with Phillips Petroleum Company at Bartlesville whereby Phillips paid directly for the raw materials from Gates and Multiflex just billed for the work of making the bundles. This arrangement was brought about because Gates by then had put Multiflex on a cash basis for hose. In the meantime, the President of Moore, Bradford Burnham reported in a memo dated November 13, 1978 (PX-45) that he knew about the desperate financial condition of Multiflex and he initiated a telephone conversation with John Yeager in which Yeager reported to him the following:

> "He [Yeager] said they have been spending all of their time trying to keep alive. They had to close Hose Systems and they thought 'Multiflex could survive but didn't know that it could at this time'."

In PX-47, on December 15, the President of Moore recounted a detailed conversation which he had on the telephone with Don Miller of Gates as to the financial problems of Multiflex and in the next to last paragraph, Burnham stated:

> "Gates is counting on Bruce [McConkey] getting refinanced in some way. I assume Yeager is going to do this. I assume it might be advantageous for me to talk further with Yeager."

Yeager testified that he recalled that Burnham did call him about that date in December of 1978 and he told Burnham that his position had not changed since the first meeting that he had with Burnham and that he was going to continue to support Multiflex. In May of 1979, Yeager became the personal guarantor to the Spring Branch bank. An arrangement with a bonding agent was worked out in September of 1979 so that all funds received by

Multiflex were delivered to the Spring Branch bank, and such arrangement continued even up to the time of the trial.

Except for several sales to Cameron, which were forced by customers in 1979, Multiflex was unable to sell any hose bundles to any of the three OEMs in the years 1977, 1978 or 1979 (PX-190).

REASONS FOR DENYING THE WRIT

The courts have consistently held that "success" in obtaining or maintaining a monopoly is not a prerequisite to proof of an attempt to monopolize under Section 2 of the Sherman Act. If this were so, the attempt to monopolize provision of the statute would no longer exist and would simply equate to the monopolization part of the statute. Yet, this appears to be Petitioners' position.

This is not a case which requires this Court's supervision of the court below, or in which the court below failed to follow this Court's prior decisions. All of the traditional elements of an attempt to monopolize case under Section 2 of the Sherman Act were presented to the jury and were considered by the court below, including the market-shares of the parties. The court below quite properly rejected the proposition advanced by Petitioners, namely, that the percentage of the market was the *sole* controlling factor in determining whether there was a violation of the Section 2 prohibition against an attempt to monopolize.

Thus, neither the trial court nor the court below purported to establish any new rule of law or to depart from any old ones.

Contrary to Petitioners' contention, the jury was properly instructed regarding barriers to entry and there were barriers to entry implicitly found, partially evidenced by the existence of the monopoly of Petitioners in the relevant market even in the face of others attempting to enter the market prior to Multiflex. Petitioners held patents, one of which they used to its fullest exclusionary extent by initiating a patent infringement suit at a crucial time when Multiflex was a fledgling entrant into the market, and which Moore had previously used to keep out another fledgling entrant. Moore used its monopoly to force the only three OEMs in the business to conspire to exclude Multiflex with the intent and objective of selling the hose bundles at a monopoly price rather than a competitive price.

In evaluating the factual basis supporting the jury verdict in favor of Multiflex, the court below found that there was substantial evidence to indicate that Moore mounted a "vicious attack against Multiflex during the early days of Multiflex's existence, and that it was prepared to do 'whatever it takes' to remain 'number one' in the business." 709 F. 2d 993; App. A at p. 20a. This is thus a flagrant case of an attempt to monopolize with the facts so strongly against Petitioners that even though the percentage of the market began to shift in favor of Multiflex in the second year, the facts dictated an affirmance of the jury verdict. To have done otherwise would have rewarded an unsuccessful monopolist for vicious anticompetitive activities with a specific intent to destroy its only competitor and thereby maintain its monopoly.

Moore's position that the obtaining of 60% of the total relevant market by Respondent in the second year establishes, without more, that there were no barriers to the entry of Respondent, and therefore, ipso facto and as a matter of law, there could not be an attempt to monopolize under Section 2 of the Sherman Act ignores the facts of this case. Such position ignores the virtually total exclusion of all sales by Multiflex to the three OEMs during the entire period 1977 through 1979 even though Multiflex continued to try to sell to the OEMs.

Such total exclusion of Multiflex from the turnkey and replacement market of the OEMs had a drastic anti-competitive effect with respect to those customers who were willing to purchase only from the three OEMs on a turnkey basis. It is also bottomed on a false legal premise, namely, that success in the marketplace by a new entrant belies any barriers to entry and precludes a court from holding that there was a dangerous probability of monopolization, even though the evidence clearly established that Moore used its market power with a specific intent to drive Multiflex out of business and almost succeeded while Multiflex was a fledgling entrant in the market.

I. The Evidence Established That Moore Was A Monopolist, Had A Specific Intent To Monopolize, And Its Overt Acts Created A Dangerous Probability That It Would Succeed In Destroying Multiflex, Its Only Potential Competitor, And Thus Retain Its Monopoly In The Relevant Market.

All of the traditional elements to establish an attempt to monopolize under Section 2 of the Sherman Act were

presented to the jury and were considered by the court below. For many years until 1978, Moore enjoyed a dominant position in the hydraulic hose bundle market, controlling at least an 80% share of the U. S. market.[8] 790 F. 2d at 984 Footnote 4; App. A at p. 3a. The jury findings of Moore's specific intent to monopolize, its overt acts in furtherance of its specific intent to monopolize, and the dangerous probability resulting therefrom were adequately supported by substantial evidence. The court below dealt specifically with both the "dangerous probability" and the market shares issues in depth, and used the proper antitrust analysis in concluding as follows (709 F. 2d at 992; App. A at p. 18a):

> "The fact that a plan violative of the spirit of the antitrust laws ultimately fails does not inexorably lead to the conclusion that there was no 'dangerous probability of success.' As the court said in *Lektro-Vend Corp. v. Vendo Co.*, 660 F. 2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S. Ct. 1277, 71 L. Ed. 2d 461 1982: '[T]he Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense.' The time to examine 'dangerous probability' is when the acts occur. We do not accept the use of hindsight plus evidence of plaintiff's successful response to the defendant's acts to exonerate an antitrust violator who did cause damage to the plaintiff.
>
> "We find adequate evidence to support the jury's implicit finding that there was a 'dangerous proba-

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[8] The jury was instructed to consider barriers to entry and market power; under Rule 49(a), since specific findings as to barriers to entry and market power were not presented to the jury, the jury "shall be deemed to have made a finding in accord with the judgment on the special verdict."

bility of success,' when we look at the situation at the time of the violation. Viewing this appeal of a jury verdict in the manner most favorable to the verdict, we can state that Samuel Moore & Co. memos showed a clear intent to freeze Multiflex out of the market. We note that Moore told Multiflex's bankers and competitors that Multiflex's products were inferior, that the company was closing down, and that the plant had been shut in anticipation of bankruptcy with Pinkerton security guards posted at the door. Viewing the danger from the proper time perspective, we can find a sufficiently dangerous probability that Moore would have maintained its monopoly power through illegal means and would have frozen Multiflex out of the market. Multiflex amply demonstrated Moore's 'overt acts' in furtherance of the attempt to monopolize, and showed anticompetitive behavior from which a specific intent to monopolize can be inferred. The fact that Multiflex was able to overcome the hurdles Moore erected and established a strong market presence should not allow Moore to escape liability, although market success could be expected to affect the quantum of a damage award. We find that Moore's market position in 1977 plus its overt anticompetitive acts indicate a specific intent to monopolize and created a dangerous probability that Moore would injure both Multiflex and the open, public market place in violation of Section 2. This dangerous probability did not materialize because of the quality of Multiflex's product and the dedicated and imaginative way the company built a market for it.

"Finding each of the necessary elements to support the jury's verdict, we affirm the district court's holding of a section 2 violation."

Petitioners' approach ignores completely the antitrust analysis of "dangerous probability" by the court below and instead would ask this Court to focus solely on the market shares *after* the critical time when the fledgling

entrant, Multiflex, was dangerously close to being eliminated as a competitor by Moore.

Petitioners appear to be relying upon *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980), as they did in the court below to support its position that a decline in Defendant's market share precluded a finding of an attempt to monopolize violation. The court below carefully considered the *Nifty Foods* case and concluded that neither *Nifty Foods* nor any other case has suggested that a drop in Defendant's market share *alone* can defeat a claim of attempted monopolization. 790 F.2d 991; App. A at p. 17a. The court below pointed out that the Second Circuit in *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 128 (2d Cir. 1981), *cert. denied*, 454 U.S. 968 (1981) made it clear that a drop in market share does not defeat an attempted monopolization claim where there is evidence to support the claim. *See also Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 496 n. 18 (9th Cir.), *cert. denied*, 434 U.S. 1040 (1977); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Lektro-Vend Corp. v. Vendo Co.* 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

II. For Petitioners To Say There Were No Barriers To Entry Is To Ignore The Facts Before The Jury And The Court Below.

Petitioners have premised the issue in their Petition to this Court on the mistaken premise that there were no barriers to entry. Contrary to such assertion by Petitioners, there were several major barriers in addition to those barriers which Petitioners themselves attempted to create to prevent Multiflex from entering the market.

First, Moore had a number of patents, including the patent on which it brought suit that initiated the present litigation. That patent related to the very hose which was used in the hose bundles that were being marketed by Moore for a number of years in the commercial world, and which the industry had come to accept. Although Multiflex's supplier of the comparable hose, Gates Rubber Company was ultimately able to modify the hose construction so as to avoid infringement of that patent, the change did not deter Moore from bringing its suit in March of 1978 and continuing its suit for over a year thereafter. Moore dropped its patent infringement claim only after it apparently realized the seriousness of the antitrust counterclaim and recognized that continuing the patent infringement further strengthened the antitrust counterclaim against Moore by Multiflex.

Further, the same patent had been asserted several years before against another fledgling entrant, American Hose & Reel, which succumbed under the pressure of trying to break into the same market that Multiflex sought to enter.

The second and probably the most difficult barrier to entry that existed for any new entrant attempting to enter the hose bundle market was the established channel of marketing created by the close relationship between Moore and the three OEMs. The OEMs made the control equipment which was used at the well site, and Moore made the hose bundles that interconnected the OEMs' control equipment above the water surface to their well apparatus located below the water. As a result, the OEMs sold the control equipment and also the hose bundles to the end users as a turnkey system. Because of the pricing

arrangement between the three OEMs and Moore for many years prior to 1977,[9] all of the sales of Moore were to the three OEMs rather than to the end users. This meant that any new entrant into the hose bundle market had to either break that arrangement between Moore and the three OEMs, or develop new distribution networks for going to the end users directly.

The evidence in this case shows that Multiflex made the effort to go through the three OEMs, but the power of Moore over the three OEMs was demonstrated dramatically by the three OEMs promptly agreeing to make no purchases from Multiflex, after Moore threatened to disrupt their pricing scheme between Moore and the three OEMs by going to the end users directly (PX-14). The result was that Multiflex was deprived of all sales through the three OEMs through the years 1977 through 1979, except for several sales to one OEM in 1979 which were forced on that OEM by an end user who demanded that Multiflex be the supplier even though the system was a turnkey system from that OEM.

Further, the established channel of marketing was so strongly entrenched that even though there was an additional cost to the end user for the hose bundles by purchasing the turnkey system from the three OEMs, those sales continued even after the end users were made aware that Multiflex would sell directly to end users at a lower cost.

It is noted that Petitioners have cited the book by M. Porter in footnote 23 which specifically lists as a bar-

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[9] See detailed explanation of the pricing arrangement in the Counterstatement of the Case at page 4 of this brief.

rier to entry "access to distribution channels". In this case, the evidence is abundant and undisputed that Multiflex was denied access to the established distribution channels in the market through the three OEMs. Even though this is not entirely comparable to the "entrenched buyer preferences" discussed in P. Areeda & D. Turner, *Antitrust Law*, §409 at 302,[10] it has the same earmarks. Although that text indicates that such buyer preferences "will not ordinarily be a serious entry barrier", when that buyer preference is coupled with the established channel of distribution as in the present case, the expense of entering the market and breaking that relationship between Moore and the three OEMs was formidable enough so that even a strongly financed company such as Vector Cable Company, a subsidiary of Schlumberger, an international company, elected not to try to break into that market.[11]

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[10] "Many buyers of consumer goods—especially goods whose quality is neither apparent or cheaply sampled—will prefer the products of known or tried firms over those of new firms about which less is known. Past advertising and promotional expenditures, coupled with presumptively satisfactory products sold over a long period, can create consumer familiarity and even trust. Such preferences may be so entrenched that a new entrant must for some period of time either charge less or advertise more than established firms. The new firm may have to spend even more than established firms had to spend in the past when their advertising messages were left diluted by rivals. And even if a comparable investment would be sufficient to neutralize the established firm's advantages, there might be an entry barrier for the reason discussed in the previous Subparagraph." *Antitrust Law*, §409 at p. 302.

[11] Mr. Adams of Vector testified that a market investigation was conducted to determine the feasibility of entry into that market and based upon that investigation, Vector elected not to attempt to break the barrier.

The third entry barrier into the hose bundle market was the capital structure required to enter the market. This barrier is closely tied to the Moore-OEMs pricing arrangement and the established channel of business. The amount of money to enter this particular market was high compared to the potential market itself. Multiflex was able to obtain the small business loan of $350,000.00 which normally would have been adequate to enter the market if the sales could have been made by Multiflex through the established channel of business, namely, the three OEMs.

When that channel was blocked by the conspiracy between Moore and the three OEMs, then the capital requirements of Multiflex were increased by the added cost resulting from the necessity to go to the end users. The three OEMs were all located in Houston, where Multiflex was also located. To market the hose bundles to the three OEMs would have been a relatively nominal expense because only calls by Multiflex within the local area of Houston would have been required.

However, when the Moore-OEM conspiracy developed due to the pressure applied by Moore on the three OEMs, and also because of the self interest of the OEMs in excluding a new entrant who would disrupt their monopoly pricing structure, the start-up cost of Multiflex increased dramatically. In addition, Moore forced additional costs on Multiflex by bringing the patent infringement suit and by going to the end users, the only possible place of business left to Multiflex, and disparaging Multiflex's product and making false statements with respect to the product as well as telling potential customers that Multiflex was going out of business.

When Multiflex attempted to get more money by borrowing it from banks, Moore found that Mr. McConkey, the owner of Multiflex, was trying to get credit through its supplier of hoses, Gates Rubber Company, and also was attempting to borrow money from Mr. McConkey's brother-in-law. At that point, Moore further increased its stranglehold on Multiflex by discouraging further credit from Gates and financial support from Mr. McConkey's brother-in-law. Thus, it can be seen that Moore used the entry cost barrier to the fullest extent in this case in an attempt to destroy Multiflex.

Finally, and importantly, there was substantial circumstantial evidence in support of the jury verdict that there was a dangerous probability of monopolization in view of the exclusion of American Hose & Reel Company and the Vector Cable Company from entry into the market, which the court below characterized as "earlier entrepreneurial attempts to enter this market had met with a similar lack of success" [breaking the barrier of sales through the OEMs] 709 F.2d at 985; App. A. at p. 4a.[12]

By reason of Moore's monopoly power, it had successfully excluded all entrants prior to Multiflex. Moore's

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[12] Petitioners have made several gross errors in their brief. First, Multiflex did not construct a second plant because of "increased demand". The plant built in England by new investments of some of the shareholders was because of the government policy in the United Kingdom to "buy U.K.", which was to take advantage of sales made in England which could not be made by a company manufacturing in the U.S.

Petitioners are also misleading when they represent to the Court at page 16 of their brief that Multiflex had a 62% of the market "in only thirteen months". At the end of 1978, which was more than thirteen months after Multiflex entered the market, it had only about 30%, and Multiflex had *zero* sales to the three OEMs.

monopoly power permitted it to force the three OEMs into a conspiracy to exclude Multiflex, an illogical action on the part of the three OEMs which should have welcomed a competitor to supply them with hose bundles. But the threat of Moore breaking up the price arrangement by going directly to the end users with its sales put the three OEMs in the position of having to decide whether Moore could succeed in excluding Multiflex.[13] Multiflex, being a new entrant, was an unknown entity to the three OEMS and therefore they could not count on Multiflex surviving the tactics of Moore to exclude Multiflex from the market.[14] In addition to that, Moore assured them that "they would do whatever was necessary to prevent Multiflex from entering into the hose business" (PX-14). So, the OEMs agreed to exclude Multiflex from any sales to the OEMs, and they did that for the years 1977-79.

For Petitioners to say that Moore could not have maintained its monopoly even if it wanted to, is also to ignore the facts. Moore had excluded Multiflex from all of the sales to the three OEMs by the conspiracy, using its market power on those three OEMs. Moore had the wherewithal as a long established financial giant compared to Multiflex and was later backed by an even bigger giant, Eaton Corporation, following the acquisition of Moore by Eaton. Moore only had to succeed in

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[13] Barriers to entry can also be "barriers erected by [the defendant's] own business policies". United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 344 (D. Mass. 1953), aff'd. per curiam, 347 U.S. 521 (1954).

[14] This was reinforced by the earlier failure of others to enter the market.

cutting off the supply of hoses to Multiflex, which it attempted to do by the patent infringement suit, or destroy its reputation in the industry with the end users, which it attempted to do by falsely disparaging Multiflex's product and its ability to continue in business, or by destroying its financial resources, which it attempted to do by talking to Mr. Yeager, the brother-in-law of Mr. McConkey. And, it must also be remembered that Moore only had to destroy one potential entrant at that time, namely, Multiflex, and it would have maintained its monopoly.

Moore, while it was in the monopoly position, had engaged in monopoly pricing by reason of its arrangement with the three OEMs, and it had acknowledged that it had to reduce those prices during this "war situation" with Multiflex, but that someday they would return to those monopoly prices (PX-54). Moore's monopoly not only provided it with the power to control prices while it had the monopoly, but it also provided it with the power to exclude all competition with the three OEMs, even after Multiflex entered the market.[15]

As the court below recognized, even though the market shares in the two year period were at first blush surprising, they do not indicate in any measure a lack of

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[15] Moore was able to reduce prices from the supercompetitive level and take advantage of its economics of scale to produce the demanded level of output at the competitive price. Although Multiflex had positive margins of revenues over variable costs for 1977 through 1979, Multiflex did not make a profit (pre-tax) until 1979. The reason for this is (1) that the anticompetitive practices of Moore reduced Multiflex's revenues from both the sales price and volume and (2) Multiflex could not take advantage of the resulting economies of scale like Moore.

monopoly power by Moore, nor do they negate the substantial evidence that there was a dangerous probability of monopolization by Moore, no matter how the antitrust analysis is approached. Except for the decreasing market share of Moore, a more devastating and convincing set of facts can hardly be imagined for a Section 2 attempt to monopolize case. As the court below stated, "This is the stuff of which antitrust cases are made." 790 F.2d at 995; App. A at p. 23a.

III. This Is Not A Case In Which To Review The Ninth Circuit Cases Dealing With The Dangerous Probability Of Monopolization Under Section 2 Of The Sherman Act.

This Court has on a number of occasions had an opportunity to review the Ninth Circuit decisions dealing with the question of "dangerous probability of monopolization" in Sherman Section 2 cases[16] and has repeatedly declined to grant certiorari in those cases, as well as in other attempt cases originating from all circuits, the most recent and most notable being the *Inglis* case and the *Twin City* case. The Fifth Circuit in this case did not adopt the Ninth Circuit approach which has used "conduct alone" as the test for dangerous probability of monopolization. The jury was properly instructed with respect to market power, barriers to entry, the consideration to be given to the declining market of the De-

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[16] *Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert denied*, 103 S.Ct. 364 (1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 57, 58 (1982); *Greyhound Computer v. International Business Machines*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

fendant, and the court below considered all of those factors in its affirmance of the jury verdict.[17] The court below was dealing with Moore as a monopolist which attempted to exclude its only potential competitor. If Moore had succeeded, and there was a dangerous probability that Moore would have succeeded in early 1978 (790 F.2d 992; App. A at p. 18a), Moore would have maintained its complete monopoly. The evidence in this case just does not support Petitioners' attempt to bring it within the Ninth Circuit's approach of "conduct alone" as the measure for dangerous probability under Section 2. This case does not provide a vehicle for any pronouncements with respect to the Ninth Circuit approach since that approach was not adopted or used by the Fifth Circuit in this case. In fact, a reading of the cases on this point decided by this Court and also the comments by the text book writers would indicate that this Court wisely has refrained from putting any straight jacket on the circumstances which can lead a court to find a violation of Section 2 of the Sherman Act. In no sense can it be said that the court below in this case failed to follow this Court's pronouncements with respect to violations of Section 2 of the Sherman Act.

Petitioners conclude with what they characterize their third and "perhaps most important" point by stating that the application of Section 2 without regard to Defendant's actual ability to achieve or maintain monopoly

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[17] Moore did not request any jury issues nor object at the trial level to the jury finding of market power. The jury specifically found the intent to monopolize (Jury Interrogatory 9; App. C at p. 4c) and acts in furtherance of its specific intent to monopolize which resulted in a dangerous probability of monopolization (Jury Interrogatory; App. C at p. 5c).

power "can have a devastating affect on the very competition Section 2 is intended to promote." As noted above, the facts considered by the jury and by the court below demonstrated conclusively that Moore in this case had the ability to maintain its monopoly power and it was dangerously close to completely obliterating Multiflex as its only competitor in early 1978. Thus, the statement urged by Petitioners for consideration by this Court is not applicable. Furthermore, if the overt acts of a monopolist intending to destroy its only potential competitor is to be accepted as permissible under Section 2 of the Sherman Act, there would be nothing of substance left to the "attempt to monopolize" statutory provision of Section 2. Such a decision would provide a safe harbor for the violator. It would strip the attempt offense of any independent significance and would leave a hollow in antitrust enforcement within which blatant and damaging anticompetitive conduct would be immunized.

Finally, Petitioners misquote *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978). The "overdeterrence" referred to by this Court had to do with the imposition of criminal liabilities under the Sherman Act ". . . without inquiring into the *intent* with which it was undertaken, . . .". [Emphasis added]. The specific intent in this case was established beyond a shadow of a doubt before the jury and was thoroughly analyzed by the court below.

The facts of this case do not justify review by this Court, and it is obvious that it is not a case in which the court below has failed to follow this Court's decisions. Neither this Court nor any appeals court has relied strictly on market shares to determine the attempt to

monopolize offense. Petitioners seek to have this Court adopt a view of the law which would encourage monopolists to use whatever means they had at hand to destroy a potential competitor. It is obvious that this is not a case which requires consideration by this Court for any reason.

IV. CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

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No. 83-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SAMUEL MOORE AND COMPANY and
EATON CORPORATION,
Petitioners,

vs.

MULTIFLEX, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONERS	1
I. An Analysis Of The Competitive Structure Of The Market Is An Essential Predicate To Any Finding Of An Attempt To Monopolize	2
II. Respondent's Analysis Of The Existence Of Entry Barriers In This Case Highlights The Need For This Court To Clarify What Constitutes An Antitrust "Barrier To Entry"	5
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES:	
American Tobacco Co. v. United States, 328 U.S. 781	3
Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093	3
Board of Trade of Chicago v. United States, 246 U.S. 231	8
Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122 (2d Cir. 1981), *cert. denied*, 454 U.S. 968	3
Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908)	7
Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U.S. 24	7
Greyhound Computer Corp. v. International Business Machine Corp., 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040	3
Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921	3
Nifty Foods Co. v. Great Atlantic & Pacific Tea Corp., 614 F.2d 832 (2d Cir. 1980)	3
Silver v. New York Stock Exchange, 373 U.S. 341	8
United States v. Columbia Steel Co., 334 U.S. 495	4
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100	6
STATUTES:	
Sherman Act, Section 2, 15 U.S.C. § 2	1,2,3,5
OTHER AUTHORITIES:	
R. Bork, *The Antitrust Paradox* (1978)	5,8
1984 Franchise Annual Handbook and Director (1984)	7
R. Posner, *Antitrust* (1974)	5,7
L. Sullivan, *Antitrust* (1977)	4,6

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REPLY BRIEF FOR THE PETITIONERS

As this case shows, there is much confusion in the law of attempt to monopolize. The lower courts, like the court below, have often failed to recognize that monopoly power cannot be maintained in the absence of significant barriers to entry. This case is a clear example of the results of this confusion in the lower courts. Multiflex's rapid success in the market and the concomitant rapid erosion of Moore's market position here clearly show (1) Moore's lack of market power, (2) the absence of barriers to entry and, thus, (3) the absence of any possibility, much less a dangerous probability, of monopolization.[1]

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[1] The long-standing conflict and confusion concerning the attempt to monopolize offense is not restricted to the Ninth Circuit. The decision below

(footnote continues)

Multiflex would have this Court focus only on the market position that Moore enjoyed before it was challenged by Multiflex and the alleged difficulty that Multiflex faced in taking away over half of Moore's market within only two years and with an initial investment of only $550,000. The statement of the claims is alone enough to highlight its weakness. Moore's obvious inability to exclude Multiflex from the market, or even to keep Multiflex from achieving a dominant share of the market, shows clearly enough the absence of any possibility of monopoly power. The absence of competitors is not necessarily monopoly power, any more than the absence of temptation is virtue. The fact that the courts below could nonetheless find a "dangerous probability of success" here highlights the need for this Court to clarify what constitutes a "dangerous probability" of success in a section 2 attempt case.

I.

An Analysis Of The Competitive Structure Of The Market Is An Essential Predicate To Any Finding Of An Attempt To Monopolize.

Contrary to what Multiflex suggests, Moore does not argue that "success" in obtaining or maintaining a monopoly is a prerequisite to proof of a section 2 attempt claim. (Brief in Opp. at 9). Moore argues that some analysis of the likelihood of monopoly—the "dangerous probability of success"—is necessary to make out a section 2 claim. The court below did not undertake the proper analysis.

The lower court's "analysis" was critically deficient because it failed to examine the competitive facts of the relevant market, focused solely on Moore's beginning market share, and ignored completely what happened in the marketplace. Multiflex's assertions aside, Moore does not focus "solely on the

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(footnote continued)

provides an excellent example of the general confusion and conflict which can only be remedied by this Court. Multiflex disputes neither the existence of this conflict nor the need to resolve it.

market share after" Multiflex's entry into the market; it focuses on the competitive facts which resulted in that decreased share.[2]

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[2] Moore pointed to a number of cases in its petition, including *Nifty Foods Co. v. Great Atlantic & Pacific Tea Corp.*, 614 F.2d 832 (2d Cir. 1980), because these cases reflect a proper appreciation for the significance of a defendant's declining market share and demonstrate a conflict in approach with the decision below. The cases cited by Multiflex in its brief in opposition are not contrary:

In *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122 (2d Cir. 1981), *cert. denied*, 454 U.S. 968, the court affirmed a jury finding for the defendant on a monopolization claim and held that it was harmless error to instruct the jury that to have monopoly power the defendant must have possessed at least 50 percent of the market. The court explained that in *Nifty Foods*, it did not affirm the defendant's judgment "simply because 48.3% was less than 50%." 651 F.2d at 128. Rather, there the court *assessed the significance of the defendant's share, "specifically noting that the share had steadily declined to 33%."* 651 F.2d at 128 (emphasis added). The court cited with approval *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 n.11 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, which also recognized the significance of a decline in the defendant's market share. 651 F.2d at 128.

Greyhound Computer Corp. v. International Business Machine Corp., 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, was premised on the Ninth Circuit's unique rule that dangerous probability of success is not an independent element of attempt to monopolize, and supports Moore's position that there is great confusion in the lower courts as to the scope of the attempt offense and what proof of a "dangerous probability" of success requires.

American Tobacco Co. v. United States, 328 U.S. 781, supports the position that a "dangerous probability of success" is a separate element of a section 2 attempt claim insofar as it cites with approval the lower court's jury instructions to that effect.

In *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, the district court rejected the plaintiff's contention that the defendant possessed sufficient market power to create a dangerous probability of monopoly because the defendant's profits and market share had steadily declined after the alleged attempt. The appellants argued that this declining performance was totally irrelevant because it occurred after the alleged attempt to monopolize. The court of appeals rejected the appellant's argument, stating that they had failed to cite any authority "which would require exclusion of the evidence of the later period of time" and citing *Nifty Foods* for the contrary position. 660 F.2d at 270. The court held that while not necessarily dispositive, *the defendant's market performance subsequent to the alleged attempt was relevant to whether the defendant ever had the actual ability to achieve a monopoly*. 660 F.2d at 271.

To establish the likelihood (or "dangerous probability") of monopoly, Multiflex and the court below relied solely on the fact that, before Multiflex ever began to compete with Moore, Moore had a significant market share.[3] But beginning market share by itself proves nothing, other than who made what share of sales in a given period. This Court has recognized that exclusive focus on market share can produce a distorted image of market power because "the relative effect of percentage command of a market varies with the setting in which the factor is placed." *United States v. Columbia Steel Co.*, 334 U.S. 495, 528. A true picture emerges only from a careful analysis of the competitive structure of the market. Thus, "[i]f the industry is one in which . . . outsiders could rapidly enter if prices were pushed significantly above competitive levels, even a share as large as 90% . . . may not confer massive" market power. L. Sullivan, *Antitrust* § 23 (1977). On the other hand, the fact that there were no demonstrated barriers to entry and that Multiflex not only succeeded in entering the market but came to dominate the market are compelling indicators of Moore's lack of market power.

The courts below did not attempt a competitive analysis, but instead merely inferred the existence of market power from Moore's market share before Multiflex entered the market. This is bad law and bad policy. The Court should make clear that such inferences, contrary to fact, are not sufficient to support conclusions such as those drawn by the court below.[4]

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[3] The Court below never made a finding that Moore possessed monopoly power in the market for hydraulic hose bundles. The evidence does not indicate that Moore was either able to raise prices and restrict output or to exclude competitors from the market—the traditional earmarks of monopoly power. Instead, in its brief in opposition, Multiflex attempts to prove the existence of such power by repeatedly claiming that Moore "forced" the three OEMs into conspiring not to deal with Multiflex. Allegedly, the OEMs agreed with Moore to exclude Multiflex because they thought Moore otherwise might succeed in excluding Multiflex from the market. This unlikely scenario cannot substitute for a showing of real economic market power, even if it were true, which it clearly is not.

[4] The Assistant Attorney General of the Antitrust Division of the United States Department of Justice recently stated that the Division will only direct

(footnote continues)

II.

Respondent's Analysis Of The Existence Of Entry Barriers In This Case Highlights The Need For This Court To Clarify What Constitutes An Antitrust "Barrier To Entry."

The concept of barriers to entry is at the economic core of section 2; an attempt to monopolize cannot present a "dangerous probability of success" if the offender is in fact not able to exclude new entrants.[5] Yet, as the respondent's brief in opposition and the decision below demonstrate, the concept of barriers to entry is easily misused to support results which are inconsistent with the purpose of the antitrust laws. Unless this Court clarifies what properly constitutes a "barrier to entry" in the antitrust sense, "it will remain impossible to make antitrust laws more rational or . . . to restrain the growth of its more powerful irrational elements." R. Bork, *The Antitrust Paradox* 310 (1978). This case—in which a new entrant became the dominant firm by the end of its second full year in business—is the perfect case in which to address this point.

The proper issue is whether there exist *artificial* barriers to entry which prevent new firms from effectively challenging a

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(footnote continued)

its enforcement efforts at "truly anticompetitive conduct that unreasonably threatens to eliminate competition in particular markets" and will carefully analyze the economic effects on the market of single-firm conduct before bringing enforcement actions. Statement of J. Paul McGrath, Before the Subcmte. on Monopolies and Commercial Law, House Cmte. on the Judiciary Concerning Antitrust Division's Authorization for Fiscal Year 1985, February 2, 1984.

[5] A barrier to entry in the antitrust sense is a condition that makes the costs of a new entrant higher than the costs of a firm already in the market:

> The existence of such a condition creates a range within which the firms in the market can raise the market price above the competitive level without attracting new entry. If the marginal cost of a firm in the market is $4 and the marginal cost of a new entrant is $5, the firms in the market can charge up to $5—a supracompetitive price—without fear of inducing entry by a firm desiring to share in the supracompetitive profits generated by the monopoly price.

R. Posner, *Antitrust* 496 (1974).

"monopolistic" market position. If, as was the case here, new firms of superior or equal efficiency are able to enter the market, no antitrust concern is raised because the alleged "monopolist" is subject to the discipline of competition. The important question is whether new entry that would otherwise be drawn by supracompetitive profits is deterred because the new entrant faces artificially high marginal costs that would wipe out any profit at a competitive price. Thus, the market shares of firms already in the market have absolutely nothing to do with the existence or significance of barriers to entry. L. Sullivan, *Antitrust* 77-78 (1977).

Both Multiflex and the court below ignored the functional significance of barriers to entry. After the fact, Multiflex hypothesizes three barriers to entry in its brief in opposition: (1) Moore's patent relating to a particular type of hose used in hose bundles;[6] (2) the "capital structure required to enter the market"; and (3) the "established channel of marketing created by the close relationship between Moore and the OEMs." (Brief in Opp. at pp. 14-18). None of these "barriers" received scrutiny by the court below, nor can they bear any now. None constitute actual barriers to entry in the antitrust sense.

Multiflex's contention that Moore's patent constituted a barrier to entry ignores the facts that it was neither difficult nor costly (in terms of time or money) to invent around the patent and that the particular technology was not essential to entry into the market. Multiflex did not invalidate the patent, nor did it obtain a license, yet it still became the dominant firm in the market within two years. Although Multiflex suggestively reminds the Court that Moore sought to protect its patent by bringing a patent infringement suit against Multiflex, Multiflex does not suggest that Moore's suit was brought in bad faith or that the patent is invalid. This Court has repeatedly held that it is not the purpose of the antitrust laws to chill the enforcement of valid patents. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 135 ("A patentee has the exclusive right to manufacture, use, and sell his invention. . . . The heart of his

[6] Although Multiflex refers to "a number of patents," it is undisputed that only one valid patent related to the hoses is involved in this case.

legal monopoly is the right to involve the State's power to prevent others from utilizing his discovery without his consent"); *see also Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908); *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24 (1923). In any event, Multiflex's success is the best gauge of the strength of this so-called "barrier."

Capital requirements are a barrier to entry only when the cost of capital to the new entrant is higher than the cost to the existing firm; the *amount* of capital required for entry affects only the *rate* of entry.[7] However, Multiflex does not claim that its cost of capital was any higher than the cost of capital to Moore. Multiflex does assert that Moore somehow artifically increased the amount of capital required beyond what it otherwise would have been, but these allegations are completely unsupported by the record. There is no evidence that Multiflex incurred increased costs by going directly to end-users (much less that such increased costs could ever be substantial enough to constitute a barrier to entry), or that Moore blocked financing from either Gates or McConkey.[8]

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[7] "A barrier to entry should be distinguished from a condition which affects the *rate* at which entry can occur." R. Posner, *Antitrust* 476 (1974) (emphasis added). The larger the amount of capital required to enter the market on an efficient scale, the longer it presumably might take for entry to occur. But capital requirements, no matter how great, only affect the *rate* of entry, and do *not* constitute antitrust barriers to entry *unless* the cost of capital is appreciably greater to a new entrant than to an existing firm. (The capital cost to an existing firm is a current cost, since the firm must reinvest capital continuously to replace worn or obsolescent productive assets.) *Id.*

[8] Multiflex also claims that the "amount of money to enter this particular market was high compared to the potential market itself." (Brief in Opp. at p. 18). First, as stated above, Multiflex introduced no evidence at trial to support a claim that the cost of selling directly to end-users was appreciably higher then selling to OEMs. Second, Multiflex's own success in the market by selling to end-users belies this argument. If the cost of selling directly to end-users was truly higher than the potential market justified, as a rational firm, Multiflex would not have entered the market, and, if it did, would not have succeeded. In any event, it is clear that the amount of capital required to enter the market was extremely small—roughly the equivalent of investment in a single gasoline station or McDonald's franchise in a large city. *See 1984 Franchise Annual Handbook and Directory* 68 (1984) (indicating that a $300,000 investment is necessary to obtain a McDonald's franchise).

Multiflex argues that "probably the most difficult barrier to entry" was the "established channel of marketing created by the close relationship between Moore and the OEMs." (Brief in Opp. at p. 15). However, the record in this case shows that this "established channel" was neither difficult nor a barrier to entry in the antitrust sense. Even a predatory disruption of distribution channels does not constitute a barrier to entry unless the distribution channel that is "closed off" is "so much more efficient then the alternative that those forced out of the pattern cannot compete." R. Bork, *The Antitrust Paradox* 158 (1978). In other words, the foreclosure of one pattern of distribution, to be a barrier to entry, must either impose significant costs on potential competitors that raise their marginal costs above a level which would allow them to earn any profit at a competitive price or make it impracticable to operate. Illustrative of this type of barrier to entry are the "essential facility" cases where a competitor is denied access to an essential economy of scale—such as, for example, where a board of trade expels or threatens to expel a member (*Board of Trade of Chicago v. United States*, 246 U.S. 231), or a stock exchange discontinues an essential connection between an independent broker and members of the exchange (*Silver v. New York Stock Exchange*, 373 U.S. 341).

Even if Multiflex were foreclosed from marketing through the OEMs,[9] the record contains no evidence that marketing directly to the end-users imposed any inefficiencies and costs on Multiflex, much less of a magnitude that Multiflex was unable to compete with Moore. Indeed, the evidence is dramatically to the contrary: by selling directly to the end-users, Multiflex came to dominate totally this market within two years.

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[9] There is no evidence in the record that Multiflex was actually foreclosed from marketing its product through the OEMs. The court of appeals found that Multiflex had failed to show that it suffered any injury due to the alleged conspiracy between Moore and the OEMs. (Pet. App. A at 12a-13a). Indeed, there was evidence in the record that at least one OEM purchased hose bundles from Multiflex during the period of the alleged conspiracy. (Pet. App. A at 5a; Cross-Pet. at 5).

The court of appeals did not discuss or consider the competitive structure of the market in question. If it had focused on competitive reality, especially the total absence of any significant barriers to entry, it would not have found any "dangerous probability" of monopoly. Decisions like the one below are the inevitable result of the confusion in the lower courts.

CONCLUSION

This Court should instruct the courts below to examine the competitive structure of the market in question and especially to consider whether there are any significant barriers to entry. When a market cannot be monopolized because there are no barriers to entry, there can be no dangerous probability of monopolization, and, as a matter of law, no attempt to monopolize violation can be found. That is what should have happened in this case, and this Court should so hold.

The petition for a writ of certiorari should be granted.

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